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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

Original, No. 12. In Equity.

STATE OF WISCONSIN, PLAINTIFF,

vs.

STATE OF MICHIGAN, DEFENDANT.

PETITION FOR LEAVE TO FILE BILL OF COMPLAINT, BILL OF COMPLAINT, AND MEMORANDUM BRIEF.

JOHN W. REYNOLDS,
Attorney General of Wisconsin;
J. E. MESSERSCHMIDT,
Assistant Attorney General;
Attorneys for Plaintiff.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

Original, No. . In Equity.

STATE OF WISCONSIN, PLAINTIFF,

vs.

STATE OF MICHIGAN, DEFENDANT.

PETITION FOR LEAVE TO FILE BILL OF COMPLAINT.

The complainant, the State of Wisconsin, comes now by John W. Reynolds, its Attorney General, and J. E. Messerschmidt, Assistant Attorney General, and represents to this Honorable Court that in the suit involving the boundary between the States of Michigan and Wisconsin from the mouth of the Montreal River, on Lake Superior, to the entrance of said boundary from Green Bay into Lake Michigan, which was decided in an original suit in this Court on the first day of March, 1926 (270 U. S. 295, 70 Law Ed. 595), and in which a decree was entered on November 22, 1926 (272 U. S. 398, 71 Law Ed. 315), the said decree does not carry into effect the decision of the court in three particulars, and was entered by this Court in the form containing the er-

roneous provisions by reason of mistakes and errors made by the attorneys representing the two States, by inadvertently and through mutual mistake presented to this Court a technical description which was entered before said errors were discovered and that said errors were not discovered until it was too late to petition this Court in the above described suit or make a motion to correct said errors.

That the plaintiff is not guilty of laches in not bringing this suit sooner; that no intervention of the rights of others has occurred since the decree was entered and that neither the State of Wisconsin nor the State of Michigan have lost any rights by reason of delay in the modification of the decree correcting the errors therein contained and that neither party is placed in a position of disadvantage by the delay in said correction of the errors.

That the plaintiff has no other remedy and that the facts, of which the foregoing are but a brief outline, are set forth in the accompanying bill of complaint, entitled as aforesaid, and this petitioner asks leave of this Court to file said bill of complaint for the purpose of having the boundary description, which was erroneously entered by the decree, modified so as to carry into effect the decision of the Court, and having said boundary line correctly established and marked.

Very respectfully,

JOHN W. REYNOLDS,
Attorney General, State of Wisconsin,
J. E. MESSERSCHMIDT,
Assistant Attorney General, State of Wisconsin.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

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STATE OF WISCONSIN, PLAINTIFF,

vs.

STATE OF MICHIGAN, DEFENDANT.

BILL OF COMPLAINT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The State of Wisconsin, one of the States of the United States of America, by John W. Reynolds, its Attorney General, and J. E. Messerschmidt, Assistant Attorney General, brings this its just complaint against the State of Michigan, another State of the United States of America, and complaining of the said State of Michigan, says:

1.

That the said defendant, the State of Michigan, in the year 1926, brought an original suit in equity in

this Court to determine the boundary between the States of Michigan and Wisconsin from the mouth of the Montreal River at Lake Superior to the ship channel entrance from Lake Michigan into Green Bay. That the said case was argued in this Court on January 5, 1926, and was decided on March 1, 1926; that Mr. Justice Sutherland delivered the opinion of the court in the following language:

> "This is an original suit in equity brought in this court to determine the boundary between the states of Michigan and Wisconsin from the mouth of the Montreal River at Lake Superior to the ship channel entrance from Lake Michigan into Green Bay. By the Enabling Act of June 15, 1836, c. 99, 5 Stat. 49, under which Michigan became a state in 1837, c. 6, 5 Stat. 144, this boundary is described as follows:
>
> "* * * thence [the mouth of the Montreal River] through the middle of the main channel of the said River Montreal, to the middle of the Lake of the Desert; thence, in a direct line to the nearest head water of the Menominee River; thence, through the middle of that fork of the said river first touched by the said line, to the main channel of the said Menominee River; thence, down the centre of the main channel of the same, to the centre of the most usual ship channel of the Green Bay of Lake Michigan; thence, through the centre of the most usual ship channel of the said bay to the middle of Lake Michigan; * * *"
>
> The Territory of Wisconsin was created by an act of April 20, 1836, c. 54, 5 Stat. 10, 11, and this boundary is there described in the reverse direction:

"• • • to a point in the middle of said Lake [Michigan], and opposite the main channel of Green Bay, and through said channel and Green Bay to the mouth of the Menominee River; thence through the middle of the main channel of said river, to that head of said river nearest to the Lake of the Desert; thence in a direct line, to the middle of said lake; thence through the middle of the main channel of the Montreal River, to its mouth; • • •"

The only difference between the two descriptions is that in the former the call is for the "most usual ship channel," while in the latter it is for the "main channel," of Green Bay. In the Wisconsin Enabling Act of August 6, 1846, c. 89, 9 Stat. 56-57, under which the state was admitted by the Act of May 29, 1848, c. 50, 9 Stat. 233, this boundary is described as "• • • running with the boundary line of the State of Michigan, through Lake Michigan, Green Bay, to the mouth of the Menominee River; thence up the channel of said river to the Brule River; thence up said last mentioned river to Lake Brule; thence along the southern shore of Lake Brule in a direct line to the centre of the channel between Middle and South Islands, in the Lake of the Desert; thence in a direct line to the head-waters of the Montreal River, as marked upon the survey made by Captain Cramm; thence down the main channel of the Montreal River to the middle of Lake Superior; • • •

"• • • That, to prevent all disputes in reference to the jurisdiction of islands in the said Brule and Menominee Rivers, the line be so run as to include within the jurisdiction of Michigan all the islands in the Brule and Menominee Rivers

(to the extent in which said rivers are adopted as a boundary), down to, and nclusive of, the Quinnesec Falls of the Menominee; and from thence the line shall be so run as to include within the jurisdiction of Wisconsin all of the islands in the Menominee River, from the falls aforesaid down to the junction of said river with Green Bay: *Provided,* That the adjustment of boundary, as fixed in this act, between Wisconsin and Michigan shall not be binding on Congress, unless the same shall be ratified by the State of Michigan on or before the first day of June, one thousand eight hundred and forty-eight."

The history of events leading up to the present controversy extends over a period of eighty years, and the evidence, including a multitude of official and other maps and documents, constitutes a long and involved record. The case is reviewed in voluminous but well prepared briefs, and was helpfully argued at the bar. This mass of material we have examined with the care properly due the importance of the issue and the high character of the parties litigant; but much of it may be put aside as unnecessary for final consideration, since the determination we have reached depends upon a comparatively few decisive facts and circumstances, either undisputed or clearly established.

In the briefs and oral arguments the boundary is divided for the purposes of convenient discussion into three distinct sections, namely: (1) the Montreal River section, extending from the mouth of the Montreal River to the Lake of the Desert and thence to the head-waters of the Menominee River (or to Lake Brule); (2) the Me-

nominee River section, extending from its headwaters (or from Lake Brule) to Green Bay; and (3) the Green Bay section, extending from the last named point through the center of the most usual ship channel of the Green Bay to Lake Michigan. Although our ultimate determination in respect of these three sections rests upon the same basic principle, they are so distinct in their physical characteristics and in respect of much of the evidence peculiarly applicable to each apart from the others, that our conclusions will be more clearly formulated and better understood if we adopt the same plan in the examination of the questions which follow."

The Montreal River Section.

[The part of the opinion referring to this section consisting of about 8 pages is omitted here as no controversy has been raised concerning it for the decree carries into effect this part of the opinion.]

The Menominee River Section.

"The description in the Michigan Enabling Act of this section of the boundary begins at the head waters of the Menominee River nearest to the Lake of the Desert in a direct line, 'thence, through the middle of that fork of the said river first touched by the said line, to the main channel of the said Menominee River; thence, down the centre of the main channel of the same, to the centre of the most usual ship channel of the Green Bay.'

The description in the act creating the Territory of Wisconsin is the same, but in the opposite direction: '* * * thence through the mid-

dle of the main channel of said [Menominee] river, to that head of said river nearest to the Lake of the Desert; thence in a direct line to the middle of said lake; * * *'

But the description in the Wisconsin Enabling Act contains important differences:

'* * * thence up the channel of said [Menominee] river to the Brule River; thence up said last mentioned river to Lake Brule; thence along the southern shore of Lake Brule in a direct line to the centre of the channel between Middle and South Islands in the Lake of the Desert; * * *' or, stated in the order of the Michigan act: From the center of the channel between Middle and South Islands in the Lake of the Desert; in a direct line to the southern shore of Lake Brule; thence along the southern shore of Lake Brule to the Brule River; thence down the Brule River to the Menominee; thence down the channel of the Menominee to its mouth.

The evidence shows that Lake Brule is not the head of the Menominee nearest to the Lake of the Desert, as called for by the Michigan Enabling Act, though the Brule River is the principal tributary of the Menominee; and the inference is pretty clear that the change of description was made in the Wisconsin Enabling Act as a part of a general readjustment of the boundary. At any rate, since this part of the line is not in controversy, we need not consider the matter except as it may reflect light upon the effect of, and the question of Michigan's acquiescence in, the further provision, that, to prevent disputes as to jurisdiction, the line shall be so run as to include within the jurisdiction of Michigan all islands in the Brule and Menominee down

to and including the Quinnesec Falls of the Menominee, and thence so as to include within the jurisdiction of Wisconsin all islands in the Menominee below the falls. As to this part of the line, the contention of Wisconsin is that the description in the Wisconsin Enabling Act was in effect a proposed adjustment of the boundary as an undividable unit, and that Michigan, by the Constitution of 1850, having expressly adopted that part of the line from the Lake of the Desert to Lake Brule, cannot be heard to say that she did not also adopt the adjustment of the line in respect of a division of the islands. There is force in this contention, and especially so in view of the fact that the change from the nearest head-water of the Menominee to Lake Brule operated to give Michigan additional territory. To permit her to reap the benefit of the adjustment so far as it is to her advantage and reject it to the extent that it is advantageous to her sister state would be plainly inequitable. We prefer, however, to rest our determination upon the conclusion, fully justified by the record, that,—whatever were the rights of the respective states in respect of the islands in question immediately upon the adoption of the Constitution of 1850,—Wisconsin, for a period of more than half a century following that time, had the undisputed and undisturbed possession of substantially all of the islands in the river below the Quinnesec Falls, and without reference to the main channel of the river, exercised jurisdiction and dominion over them with the knowledge and acquiescence of the complainant.

Captain Cram's first report to Congress, dated December, 1840, points out the impracticability

of following the center of the main channel of the river:

"The 'center' of the main channel of the Menominee River is made a part of the boundary. The river contains numerous islands, and consequently more than one channel, where these islands occur. It will be impossible in many of these cases to know which is the 'main channel' without minute surveys. In many cases it was tried and found impossible to decide by a simple inspection or reconnaissance which was the 'main channel.' It should also be remarked here that the term 'main channel' applied to the multiplicity of channels of the Menominee, would be somewhat ambiguous in any event—for, it may be asked—Is the main channel the widest channel of the river? Or is it the deepest? If it is the widest or deepest now, will it be the widest or deepest hereafter? Or shall the main channel be that through which the greater quantity of water shall be found to pass at the time of the survey? And if it should occur that two channels at the same island pass equal quantities of water—which would then be regarded as the boundary? These questions are sufficient to show the indefiniteness of the term 'Main Channel'—There are also a few islands in the Brule River to which similar questions might apply in reference to the term 'Main Channel.'

"To avoid all ambiguity in reference to these channels, it might be specified in the act defining the boundary, that in ascending the stream, the boundary shall follow the extreme left hand channel of the Brule and the extreme right hand channel of the Menominee down to a well known point of the river—say Pe-me-ne Falls; and thence to follow the extreme left hand channel

of the remainder of the Menominee to its mouth. Such a division would leave most of the islands in Michigan and the remainder in Wisconsin, and would avoid much expense in minute surveys to ascertain the 'main channel' and would leave no indefiniteness upon this part of the boundary. The free use of either channel for the purpose of navigation would, from an established principle of law, be open at all times to the citizens of either state, and the islands would be nearly distributed in equal proportions between the two states."

Following the date of this report in respect of the impossibility—or extreme difficulty practically amounting to that—of locating the boundary in accordance with the provisions of the Michigan Enabling Act, and, it fairly may be assumed, with a view of effectuating Captain Cram's recommendation, the Michigan Legislature passed the resolution already referred to, calling upon Congress to cause the boundary to be surveyed and marked in conformity with the manifest general intent of the Michigan Enabling Act, and requesting the delegation of the state in Congress to use their efforts to secure such action. This was followed, as already stated, by the introduction of the bills in the Senate and the subsequent insertion, by agreement between the members of Congress from Michigan and the Wisconsin delegate, of the provision in the Wisconsin Enabling Act dividing the islands in accordance with Captain Cram's suggestion, except in a particular not important here.

In 1854, the survey of all of the islands below Quinnesec Falls as a part of Wisconsin, was directed by the United States Surveyor General

for Wisconsin, and such survey was immediately begun and thereafter continuously prosecuted. The evidence, in our opinion, fairly shows that, as early as 1879, the greater part in area of all of them had been thus surveyed and platted as belonging to Wisconsin, including many which would fall on what Michigan claims is the Michigan side of the main channel. On behalf of Michigan, it is strongly contended that to this there are important exceptions. But, without going into details, it is enough to say that the clear weight of the evidence is to the contrary. It is true that so-called Island No. 8, or Merryman's Island, was surveyed as in both states; that the Wisconsin survey was subsequently cancelled; and that, thereafter, exclusive jurisdiction over the tract of land constituting it was exercised by Michigan. It is said that, nevertheless, the "island" is now claimed by Wisconsin; but, on the contrary, Wisconsin concedes that it belongs to Michigan. The fact is that the tract was originally considered to be an island and, consequently, surveyed as a part of Wisconsin. Upon further investigation, it was found by the United States Surveyor not to be an island, but, in reality, a part of the Michigan mainland. The Wisconsin survey was, accordingly, cancelled and the title of Michigan thereafter fully conceded. Two other so-called islands of small area in the same vicinity are in like situation.

Some of these islands, comparatively small in area and of little consequence, have never been surveyed or any definite acts of dominion exercised over them by either state. But to this we attach no importance. The assertion and exercise of dominion by Wisconsin over the islands

on the Michigan side of the channel was begun and has continued in virtue of, and in reliance upon, the readjustment of the boundary set forth in the Wisconsin Enabling Act. The rule is well-settled in respect of individual claimants that actual possession of a part of a tract by one who claims the larger tract, under color of title describing it, extends his possession to the entire tract in the absence of actual adverse possession of some part of it by another. *Clark's Lessee* v. *Courtney*, 5 Pet. 319, 354; *Hunnicutt* v. *Peyton*, 102 U. S. 333, 368; *Ellicott* v. *Pearl*, 10 Pet. 412, 442; *Smith* v. *Gale*, 144 U. S. 509, 525-526; *Montoya* v. *Gonzales*, 232 U. S. 375, 377; *Louston Oil Co. of Texas* v. *Goodrich*, 213 Fed. 136, 142. Upon like grounds and with equal reason, under circumstances such as are here disclosed, the principle of the rule applies where states are the rival claimants. It results that the Wisconsin Enabling Act, together with the Act of Admission, gave color of title in that state to all of the islands within the limits there described; and that her original and continued possession, assertion and exercise of dominion and jurisdiction over a part of these islands, pursuant to such legislation and with the acquiescence of Michigan, extended Wisconsin's possession, dominion and jurisdiction to all of them, in the absence of actual possession of, or exercise of dominion over, any territory within the boundary by Michigan. The fact that the islands constitute separated tracts of land is of no consequence here, whatever its effect might be under other conditions. In applying the rule, the area within the described boundary, both land and water, must be considered as together constituting a single tract of territory.

We, therefore, hold, as to this section of the boundary, that from Lake Brule to the mouth of the Menominee the line, which is now fixed and finally established by long acquiescence, follows the channels of the Brule and Menominee wherever they are free from islands; that wherever islands are encountered above the Quinnesec Falls the line follows the channel nearest the Wisconsin mainland, so as to throw all such islands into Michigan; and that wherever islands are encountered below the Quinnesec Falls the line follows the channel nearest the Michigan mainland, so as to throw all such islands into Wisconsin.

The Green Bay Section.

In determining the boundary through this section, the question is not embarrassed by differences of description. The calls of the Michigan Enabling Act are down the channel of the Menominee to "the centre of the most usual ship channel of the Green Bay of Lake Michigan; thence through the centre of the most usual ship channel of the said bay to the middle of Lake Michigan." The Wisconsin Enabling Act calls for the same boundary.

The evidence shows that there are two distinct ship channels, to either of which this description might apply. From the mouth of the Menominee, the channel, according to the Michigan claim, proceeds across the waters of Green Bay in an easterly direction until near the westerly shore of the Door County peninsula; thence, in close proximity to the shore, in a northerly direction to a point opposite Death's Door Channel (or *Porte des Morts*); thence through that channel into Lake Michigan. The

channel claimed by Wisconsin, after leaving the mouth of the Menominee, turns to the north and pursues a northerly direction to a point opposite the Rock Island passage which lies between Rock Island and St. Martin's Island; thence through the Rock Island passage into Lake Michigan. [Black letters ours.] The territory in dispute lies between these rival channels, and embraces two groups of islands; (1) Chambers Island, the Strawberry Islands, and a few others, small and unnamed, all within the main waters of Green Bay west of the Door County peninsula; and (2) Rock, Washington, Detroit and Plum islands, lying between Death's Door Channel and the Rock Island passage, at the north end of the peninsula. The evidence as to which of the two ship channels was the usual one at the time of the adoption of the Michigan Enabling Act is not only conflicting, but of such inconclusive character that, standing alone, we could base no decree upon it with any feeling of certainty. Living witnesses are no longer available; and tradition, recollection of statements made by persons long since dead—if of any legitimate value—deductions drawn from ancient documents, more or less cryptic, and inferences based on more recent uses of the channels or on their relative safety and convenience as indicated by physical characteristics, all relied upon in the absence of first-hand evidence, constitute at best most unsatisfactory substitutes. If it were necessary we should, of course, undertake the task—as we should be bound to do—of reaching a conclusion from these dubious premises. But, it is not necessary, for, as in the case of the two sections of the boundary just discussed, the title of Wisconsin to the disputed

area now in question, is established by long possession and acquiescence; and this conclusion is justified by evidence and concessions of the most substantial character.

There is evidence of acts of dominion and possession of some of the disputed islands while Wisconsin was yet a territory. Almost from the day of her admission, the State has continuously possessed, asserted title and exercised jurisdiction and dominion over all of the islands within the boundary claimed by her. In support of this general statement, the following, among other things, may be cited: On March 21, 1855, Washington, Detroit, Rock and Plum islands, described as being in the waters of Green Bay in Door County, were organized by an act of the Wisconsin Legislature as the town of Washington. Ch. 210, Laws of Wisconsin, 1855. A census taken the same year by the town clerk showed a population of 318, which has since grown, it is said, to about 1,000. Since before that time, the United States Land Department, by its surveys, plats and sales of public lands, has uniformly and notoriously recognized the islands as a part of Wisconsin, without objection on the part of Michigan. Indeed, as early as 1837, they were surveyed and platted as a part of Wisconsin Territory. A large number of maps published and available to the public during the years between 1837 and 1878, without exception, show the islands as a part of Wisconsin; and during the same time they do not appear in any survey or upon any map as belonging to Michigan. Never, so far as we are able to find from the record, have they been recognized in any practical way as a

part of Michigan or, prior to the commencement of this suit, claimed by that State.

The evidence in respect of the other group of islands, while perhaps not so complete, is definite and clear to the same effect. The taxation of lands on Chambers Island began while Wisconsin was still a territory. In 1861 voters on that island participated in a Wisconsin election. A history of Door County, introduced by complainant, recites that the island constituted an organized town forming a part of Door County, Wisconsin, as early as 1867. Evidence of early and continued recognition and treatment of the island as a part of Wisconsin by the United States through its surveys, etc., is to the same effect as that in respect of the other group. And the evidence is likewise the same in respect of the uniform appearance of Chambers Island and the other small islands of the group upon the old maps as a part of Wisconsin, and their absence from Michigan surveys and maps. The absence of evidence of specific acts of dominion over the Strawberry and the other small islands of this group is easily understood and does not affect the result. They are of little consequence, lying well within the boundary as claimed by Wisconsin, easterly from Chambers Island and near the westerly shore of the Door County peninsula. They appear on all maps as and have never been regarded or treated otherwise than a part of Door County. It is impossible to give them a status differing from that of the larger island and the peninsula, between, and within the shadows of, which they lie.

That Wisconsin since statehood has continuously asserted title and has exercised complete

and exclusive dominion over all the islands of both groups is really not a serious issue. Indeed, the bill of complaint avers that Wisconsin has possessed herself of, and exercised sovereignty over, the islands, including Washington, Plum, and Strawberries, and numerous other valuable islands, and has excluded and continues to exclude the State of Michigan from her rights thereto; and, more particularly, that: "Wisconsin has for many years disregarded the true and rightful boundary * * * and has for a long time past possessed and does now possess, and has asserted and does now assert, civil, criminal and political jurisdiction over those portions of the territory within the Michigan boundaries above described as the Montreal River section, the Menominee River section, and Green Bay sections of the disputed territory, aggregating approximately 255,000 acres, * * * and has unlawfully taxed and still continues to unlawfully tax said property, * * * " The explanation relied upon is that the State of Michigan, as a result of her excusable ignorance, has not been aware of the real facts and, therefore, should not be held to have lost rights by long acquiescence which she otherwise might have had. This view cannot be accepted and may be dismissed with a reference to what we have already said as to the same defense in respect of the Montreal River section.

In respect of the controversy as a whole, and each of the three sections, the words of this court in *Indiana* v. *Kentucky*, *supra*, p. 509, are singularly apposite and conclusive:

"* * * It was over seventy years after Indiana became a State before this suit was

commenced, and during all this period she never asserted any claim by legal proceedings to the tract in question. She states in her bill that all the time since her admission Kentucky has claimed the Green River Island to be within her limits and has asserted and exercised jurisdiction over it, and thus excluded Indiana therefrom, in defiance of her authority and contrary to her rights. Why then did she delay to assert by proper proceedings her claim to the premises? On the day she became a State her right to Green River Island, if she ever had any, was as perfect and complete as it ever could be. On that day, according to the allegations of her bill of complaint, Kentucky was claiming and exercising, and has done so ever since, the rights of sovereignty both as to soil and jurisdiction over the land. On that day, and for many years afterwards, as justly and forcibly observed by counsel, there were perhaps scores of living witnesses whose testimony would have settled, to the exclusion of a reasonable doubt, the pivotal fact upon which the rights of the two States now hinge and yet she waited for over seventy years before asserting any claim whatever to the island, and during all those years she never exercised or attempted to exercise a single right of sovereignty or ownership over its soil. It is not shown, as he adds, that an officer of hers executed any process, civil or criminal, within it, or that a citizen residing upon it was a voter at her polls, or a juror in her courts, or that a deed to any of its lands is to be found on her records, or that any taxes were collected from residents upon it for her revenues.

"This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority.

"The result is that complainant has failed to maintain her case in any particular; and that the claims of Wisconsin as to the location of the boundary in each of the three sections are sustained.

"The decree, therefore, will be for Wisconsin, costs to be divided between the parties in accordance with the general rule in cases of this character. *North Dakota* v. *Minnesota*, 263 U. S. 583. The boundary seems to be sufficiently defined for all purposes of future possession and jurisdiction; but the parties, or either of them, if so advised, may within 30 days submit the form of a decree more particularly to carry this opinion into effect; failing which, a simple decree dismissing the bill will be entered. [Black letters ours.]

"It is so ordered."

That the above decision is reported in 270 U. S. 295, 70 L. Ed. 595, 46 Sup. Ct. Rep. 290.

2.

That following the announcement of the decision of the Supreme Court, R. M. Rieser, special counsel for the State of Wisconsin, submitted a form of decree marked Exhibit B which is made a part of this bill, whereupon the attorney for the State of Michigan, the plaintiff in said suit, entered objections in the form given in Exhibit C, also made a part of this bill. That thereupon the State of Michigan, through its counsel, submitted a motion to amend the proposed decree which is also made a part of this bill and marked Exhibit D. That a number of conferences were held by the attorneys in the case and when it came to define the boundary in Green Bay the attorneys for Michigan submitted a proposed draft of the boundary description drafted by Thomas R. Hasley, city engineer of the city of Menominee, Michigan, defining its view of the proper course of shipping down Green Bay. That Mr. Hasley and the counsel of the State of Michigan, who lived at Menominee, Mich., were both familiar with conditions in Green Bay. That the description in the decree covering Green Bay is highly technical and of a nature which will easily mislead an attorney as well as a layman when not versed in nautical terms and language. That a mistake by an expert is liable to cause mistakes when accepted by the parties in the case. Both parties accepted the description of the boundary by said Mr. Hasley, believing it to carry into effect the said decision. The description of the boundary in Green Bay and that part with reference to Sugar Island, submitted by the expert after being ac-

cepted, was by the parties, in compliance with the authority given in said decision, submitted to the court. This decree containing the erroneous description was entered on November 22, 1926, and reported in 272 U. S. 398, 71 L. ed. 315.

3.

The said decree submitted to the court and reported in 272 U. S. 398, 71 L. ed. 315, reads as follows:

> "Decree announced by Mr. Justice Sutherland:
>
> "This cause having been heard and submitted upon certain questions, and the court having considered the same and announced its conclusions in an opinion delivered March 1, 1926 (270 U. S. 295, 70 L. ed. 595, 46 Sup. Ct. Rep. 290).
>
> "Now for the purpose of carrying the said opinion into effect, it is ordered, adjudged and decreed:
>
> "1. That the boundary between the States of Michigan and Wisconsin along the following course be and it is hereby fixed and finally established as follows:
>
> "From Lake Superior through the middle of the main channel of the Montreal river, to the headwaters thereof, as established in the survey of Captain Cram at the junction of the Pine river and the Balsam creek (also known as Lehman's creek), thence along the line of the survey of William A. Burt of 1847, to the center of the channel between Middle and South islands in the Lake of the Desert, thence continuing along the line of said survey to the shore of Lake Brulé, thence along the southerly shore of

Lake Brulé to the center of the main channel of the River Brulé, thence down the center of the main channel of the Rivers Brulé and Menominee, **to the center of the harbor entrance of said Menominee river, thence in a direct line to the most usual ship channel of Green bay, passing to the north of Green island and westerly of Chambers island and through the Rock Island passage into Lake Michigan, by courses and distances as follows: From a point midway between the outer ends of the Menominee river piers, thence east by south, 7½ miles to the center of the most usual ship channel of the Green bay, thence along said ship channel north by east one-eighth east, 8⅞ miles, thence continuing along said ship channel north by east seven-eighths east, 27 miles, thence continuing along said ship channel, east one-fourth north, 10¼ miles, thence east three-fourths north to the boundary between the state of Michigan and the state of Wisconsin in the middle of Lake Michigan.** * * *"

"Provided, that the section of the boundary in the Brulé and Menominee rivers shall follow the main channel thereof, except that where islands occur in the Brulé River or in the Menominee River, down to and inclusive of the Quinnesec Falls, extending to the line between sections 5 and 6, Township 38 north, of Range 20 east, of the Wisconsin Public Survey, extended across said river, the line shall pass through the channel nearest the Wisconsin bank, so as to throw all such islands into Michigan; and where islands occur in the Menominee river below the Quinnesec Falls, the line shall pass through the channel nearest the Michigan bank, so as to throw all such islands into Wisconsin. Pro-

vided further, that the land known as 'Merryman's Island,' being surveyed as part of sections 20 and 29, Township 36 north, of Range 28 west, of the Michigan Public Survey, **and the land known as 'Sugar Island,' being a part of lots 1 and 2, Section 11, lot 6 of Section 2, and lot 1 of Section 3, Township 31 north, of Range 27 west, of the Michigan Public Survey, is determined to be part of the mainland of Michigan.**" [Black letters ours.]

4.

That it appears from the above quoted decision of the court that the court held that—

> " * * * the channel claimed by Wisconsin after leaving the mouth of the Menominee, turns to the north and pursues a northerly direction to a point opposite the Rock Island Passage, which lies between Rock Island and St. Martin's Island; thence through the Rock Island Passage into Lake Michigan. * * *"

And it appears further that the court decided that—

> "The result is that complainant has failed to maintain her case in any particular; and that the claims of Wisconsin as to the location of the boundary in each of the three sections are sustained.
>
> "The decree, therefore, will be for Wisconsin * * *."

That plaintiff says that the court in the decision as above quoted correctly stated the position of the State of Wisconsin.

5.

That it appears and the plaintiff alleges that the said decree of the court above quoted does not carry into effect the said decision of the court in that the line describing the boundary in the decree after leaving the mouth of the Menominee does not turn to the north and does not pursue a northerly direction to a point opposite the Rock Island Passage which lies between Rock Island and St. Martins Island and does not run through the Rock Island Passage into Lake Michigan, but that said boundary line after leaving the mouth of the Menominee river as described in said decree, runs east by south 7½ miles, fully one half of the distance across the waters of Green Bay and then turns along a line north by east ⅛ east, 8⅞ mile, and then follows a line far to the north and east of the boundary line described in the decision and does not run through the Rock Island Passage into Lake Michigan but cuts off part of the mainland of Michigan as indicated in the annexed chart marked Exhibit A. The boundary as so erroneously fixed by the present decree is represented on the map marked Exhibit A, as the heavy line marked A H O K J X.

That the line showing the boundary as contended for by the state of Michigan in said suit is represented by the line A M N P.

That the boundary which the state of Wisconsin, the plaintiff herein, prays in this suit to have established in the modified decree by this court as carrying into effect the decision of the court in said suit is marked on said Exhibit A as the line A B C D E F G.

That said line passes along the center of the main ship channel as required by the enabling acts of Michigan and Wisconsin, and it appears further that the court correctly stated the position of the State of Wisconsin in said decision in the following language:

> "The channel claimed by Wisconsin after leaving the mouth of the Menominee turns to the north and pursues a northerly direction to a point opposite the Rock Island passage which lies between Rock Island and St. Martins Island, thence through the Rock Island passage into Lake Michigan."

On page 253 of the brief of the State of Wisconsin in the original action appeared the following:

> It is the claim of Wisconsin that the boundary runs from the mouth of the Menominee River to the west and northwest to Chambers Island following approximately the dotted line on the map.

6.

Plaintiff further alleges that it was the position of the State of Wisconsin throughout the trial that the boundary line leaving the mouth of the Menominee River pursues a course to the north as is especially shown by the sketch of the Green Bay section showing boundary as given on page 20 of the brief of the defendant, State of Wisconsin, filed in the original action; that the State of Wisconsin throughout said action maintained that the words "the usual ship channel" as used in the Enabling Act of Michigan and also followed in the Enabling Act of Wisconsin means the

main channel, as distinguished from a shipping course; that charts of shipping courses were introduced in evidence and proved that the usual shipping channel was the one that passed between Rock Island and St. Martin's Island and between Chambers Island and the Michigan mainland. It was the position of Wisconsin that the centre of said shipping channel is the centre of said main channel. There appears on page 29 of the brief on behalf of the State of Wisconsin in the original action the following:

> "The principal fact which appears in this connection is that Congress considered the phrases 'most usual ship channel' and 'main channel' to have the same meaning and to refer to the same channel. At the same time when the Michigan Enabling Act was being considered by Congress a bill was pending for the establishing of the territorial government for Wisconsin. This bill was introduced somewhat prior to that which became the Michigan Enabling Act and which became law about two months before the latter. The territory of Wisconsin as created by the above mentioned Act was bounded in the Green Bay region as follows: 'Thence through the middle of the main channel of Green Bay to the middle of Lake Michigan'. The fact that bill found in Wisconsin was before Congress contemporaneously with the bill founding Michigan and that both were considered and passed at substantially the same time shows that Congress meant to confer upon one unit the same common boundary as that given to the other. It is inconceivable that there could have been any other intention. It must be plain therefore that the term 'most usual ship channel' as used in the Michi-

> gan Enabling Act was meant to refer to the same channel as the term 'main channel' in the Wisconsin territorial act. This argument is amplified on pages 243 to 247."

That the middle of the usual ship channel did not refer to a shipping course but to the passage extending from shore line to shore line and that such was the position of the State of Wisconsin in the original action appears on page 253, where the following language was used:

> "It appears from the most casual glance at the chart that the passage to the west of Chambers Island is a great deal wider and deeper than that to the east * * * that the distance between the 6½ foot shoals immediately above the letter 'h' of the word 'channel' in the words 'Strawberry Channel' [referring to map Michigan Exhibit 115] to the point just below the mainland was about 3/8 of a mile; and that the distance from the Chambers Island light on the northwest island to the Michigan mainland to the west thereof is 6 5/8 miles. It thus appears that the maximum width of the channel claimed by Michigan as the boundary is about 1/6 of the width of the channel claimed by Wisconsin and that the minimum width of the channel claimed by Michigan is about 1/18 thereof."

7.

The complainant herein further says that the following part of the decree also is erroneous, being a part of the last sentence in the decree, to wit:

"And the land known as Sugar Island being a part of lots 1 and 2, section 11, lot 6 of section 2 and lot 1 of section 3, township 31 north, of the range 27 west, of the Michigan public survey, is determined to be a part of the mainland of Michigan." [Black letters ours.]

Complainant says that lot 1 in section 11 of the Michigan township referred to does not appear to touch any part of the modern Sugar Island, that the land specified is not in any way insular but is a part of the mainland from the days of the earliest settlement survey, that lot 2 is meant to include the eastern portion of Sugar Island, but islands are understood to be not usually parts of lots unless so shown, that lot 6 appears to include the eastern tip of Grassy Island not mentioned in the decree and to lie westerly of Sugar Island; that Grassy Island was surveyed into lots in 1848 in contrast to Sugar Island which was not; that lot 1 to section 3 includes the eastern half of Grassy or Carpenter Cook Co. Island adjacent to lot 6 of section 2; that the decision of the court does not specifically name Sugar Island, but gives the islands south of Quinnesec Falls in the Menominee River to Wisconsin. The decree gives Sugar Island to Michigan by determining that it is a part of the mainland but describes lands which only partially can be construed to cover Sugar Island and part of said description covers Grassy Island instead. Complainant alleges that this erroneous part of the decree should be modified to carry out the decision of the court.

8.

Complainant says that the above errors in the decree are apparent upon the face of said decree; that they were mutual mistakes inadvertently made; that they were not discovered until the latter part of the year 1929; that the reason why the action has not been brought sooner is because conferences have been held between the representatives of Michigan and Wisconsin meeting at Washington, at Chicago and also at Lansing, Michigan, endeavoring to come to some agreement as to the modifications that should be made in the decree; that it has been impossible to arrive at such agreement; that in the early part of the year 1931 J. E. Messerschmidt, Assistant Attorney General of Wisconsin, went with the Chief Conservation Warden of the State of Wisconsin to Lansing, Mich., and interviewed the Attorney General, conferring with him, thereby attempting to get the consent of the Attorney General of Michigan to join the State of Wisconsin in asking for a modification of the decree by the Supreme Court as outlined in this bill, but at that time the Attorney General of Michigan took the position that if the State of Wisconsin would present this matter to the Supreme Court, they [Michigan] would not raise any objection to the jurisdiction of the court but would present to this court their side of the matter and changes or modifications of the decree as they claimed they should be made. Thereupon the attorneys for the State of Wisconsin prepared a motion and served notice on the Attorney General of Michigan that a motion would be made in the Supreme Court for a modification of the

decree, that it was found that the motion could not be heard until the 3rd of October, 1932. That the Attorneys for the State of Michigan in serving an answer to the said motion raised the question of the jurisdiction of the court. In view of said fact the motion was not presented, and the State of Wisconsin, the complainant herein, had no other remedy than to ask this court for leave to file a bill of complaint beginning an original action to correct and modify the decree to comply with the decision of the court. That the errors complained of were not discovered until after it was too late under the rules of the court to make a motion to modify the decree without the consent of the parties.

9.

The plaintiff further alleges that both states have by mutual consent practically avoided any aggressions on any of said boundary in Green Bay adversely claimed awaiting the decision of this court in this matter; that no vested rights have been acquired since said erroneous decree was entered; that there are no interventions of the rights of others, neither is there any loss of the rights of either state and neither state will be placed in a position of disadvantage by the correction of this decree by reason of the delay in the modification of said decree.

10.

That the plaintiff State of Wisconsin is damaged by the erroneous description in said decree; that she loses thereby about thirty-five square miles of fishing area

opposite the city of Menominee, which had always been under the jurisdiction of Wisconsin and over which Michigan has never exercised any jurisdiction and the plaintiff would be damaged by having its citizens compelled to take out licenses from Michigan authorities for the right to fish never heretofore required. That the state of Wisconsin is also damaged by having part of Grassy Island under the jurisdiction of Michigan, besides other land. That the plaintiff is further damaged by the uncertainty of the rights of its citizens caused by the uncertainty of the boundary erroneously fixed by the decree.

Wherefore, being without remedy except by original proceeding in this Honorable Court and to the end that the State of Michigan may full, true, direct and perfect answer make to all and several the matters and things hereinbefore set forth "but not under oath, answer under oath being hereby expressly waived as fully and particularly as if the same were here repeated and the defendant distinctly interrogated in regard thereto," and (*a*) the plaintiff prays that that part of said decree beginning in the 13th line of said decree which read as follows:

> "• • • to the center of the harbor entrance of said Menominee River, thence in a direct line to the most usual ship channel of Green Bay, passing to the north of Green Island and westerly of Chambers Island and through the Rock Island passage into Lake Michigan, by courses and distances as follows: From a point midway between the outer ends of the Menominee River piers, thence east by

south, 7½ miles to the center of the most usual ship channel of the Green Bay, thence along said ship channel north by east one-eighth east, 8⅞ miles, thence continuing along said ship channel north by east seven-eighths east, 27 miles thence continuing along said ship channel, east one-fourth north, 10¼ miles, thence east three-fourths north to the boundary between the State of Michigan and the State of Wisconsin in the middle of Lake Michigan. * * *",

be stricken and that in place thereof the following be inserted:

"to the outer end of the piers at Menominee being the center of the harbor entrance of said Menominee River, thence in a direct line to a point half-way from Chambers Island to the Michigan mainland measured from the water's edge at the narrowest channel; thence in a direct line to the west end of the Whaleback Shoal; thence in a direct line to a point half-way from the water's edge adjacent to Boyer's Bluff to the water's edge on the Michigan mainland at the mouth of Bark River; thence in a direct line to a point half-way from the water's edge at Boyer's Bluff to Driscoll Shoal; thence in a direct line to the light on St. Martin's Shoal; thence east three-quarters north to the boundary between the State of Michigan and the State of Wisconsin in the middle of Lake Michigan;".

(*b*) If this said boundary in the Green Bay section is approved in principal as there outlined, then the plaintiff suggests to the court and prays that the

court appoint three commissioners to fix said boundary in detail, describe it in technical language and mark it by courses and distances from substantial monument ashore at a half-dozen or more given points, following the procedure in the case of *State of Minnesota* v. *State of Wisconsin*, 258 U. S. 519, 66 L. Ed. 150.

(*c*) That the following parts of the decree referring to Sugar Island:

> "And the land known as 'Sugar Island' being a part of lots 1 and 2, section 11, lot 6 of section 2 and lot 1 of section 3, township 31 north of range 27 of the Michigan public survey is determined to be a part of the mainland of Michigan"

be modified to carry out the decision of the court.

(*d*) That this complainant may have such other and further relief in the premises as may be equitable and as the court may deem proper.

(*e*) May it please the court to grant this complainant the most gracious writ of subpœna to the said State of Michigan and to the Honorable Wilbur M. Bruckler, Governor of Michigan, and to the Honorable Paul W. Voorhies, Attorney General of said State of Michigan, commanding each of them to be and appear in this Honorable Court on a day to be therein named and to abide the orders and judgment of the court.

STATE OF WISCONSIN,
By JOHN W. REYNOLDS,
Attorney General.
J. E. MESSERSCHMIDT,
Assistant Attorney General.

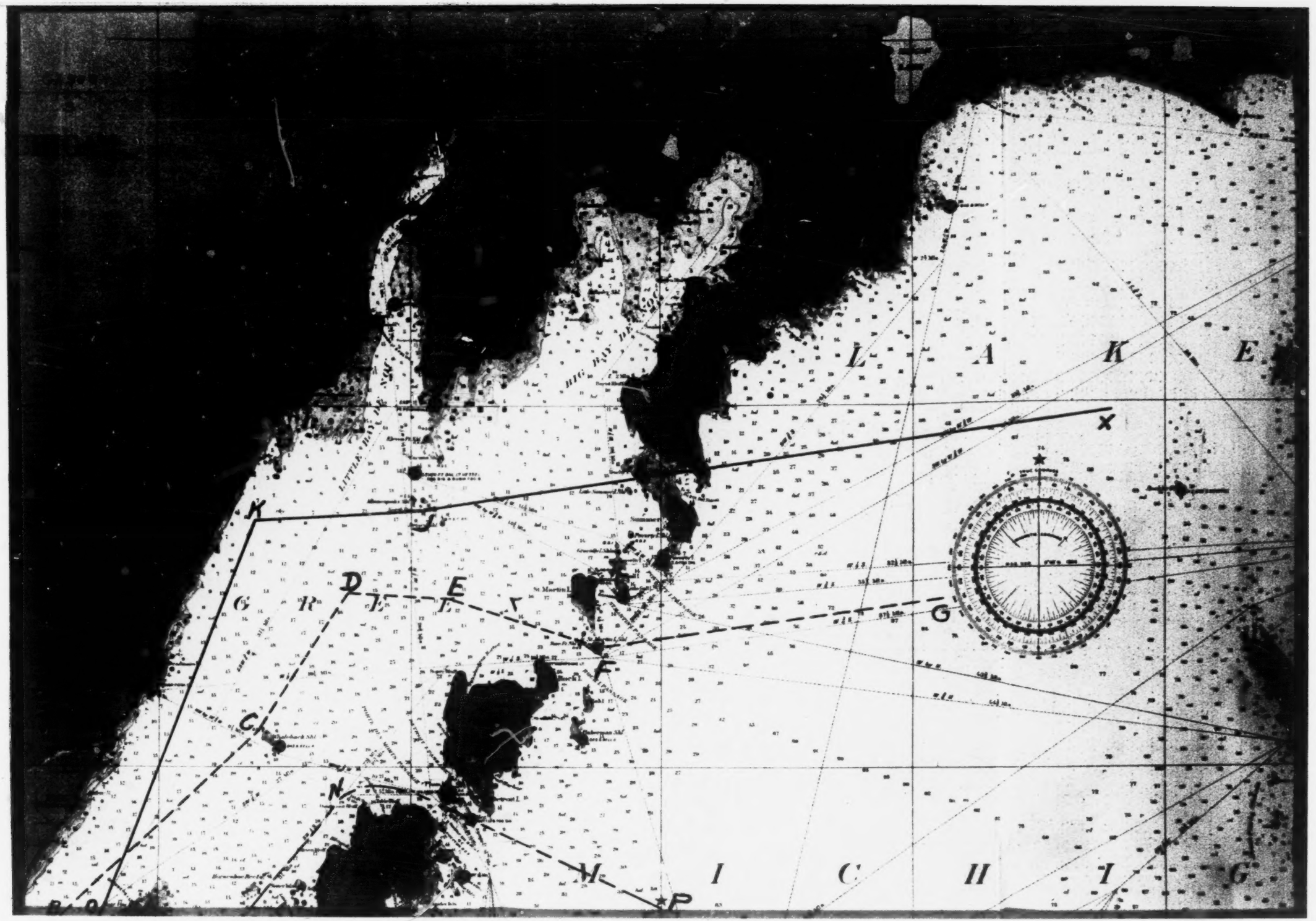
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Exhibit B.

United States of America:

IN SUPREME COURT.

State of Michigan, *Plaintiff*,

vs.

State of Wisconsin, *Defendant*.

This cause having been heard and submitted upon certain questions, and the court having considered the same and announced its conclusions in an opinion delivered March 1, 1926 (270 U. S. 295),

It is ordered, adjudged and decreed:

1. That the boundary between the States of Michigan and Wisconsin along the following course be and it is hereby fixed and finally established as follows:

> Beginning at the boundary line between the State of Michigan and the State of Wisconsin in the middle of Lake Michigan and opposite the most usual ship channel leading into Green Bay from said lake, thence in a direct line to the middle of the most usual ship channel into Green Bay, thence along the middle of said channel which is north of Rock Island and north and west of Chambers Island, to the main channel of the Menominee River, thence along the main channel of said Menominee River and the Brule River, wherever the said rivers are free of islands, to Lake Brule, provided, that wherever islands are encountered in either of said rivers,

the boundary line follows along the channel nearest the Michigan mainland so as to throw all such islands between the mouth of said Menominee River and the Quinnesec Falls extending between Section 6, Township 38 North of Range 20 West of the Wisconsin survey, and Section 8, Township 39 North of Range 30 West in the Michigan survey, in said river into Wisconsin, and wherever islands are encountered in said rivers between said Quinnesec Falls and Lake Brule, the boundary follows the channel nearest the Wisconsin mainland so as to throw all such islands into Michigan, thence along the southern shore of Lake Brule in a direct line to the center of the channel between the Middle and South Islands in the Lake of the Desert, thence in a direct line to the headwaters of the Montreal River, as marked upon the survey made by Captain Cram, said line between Lake Brule and the headwaters of said Montreal River to follow the line surveyed, marked, established and identified by William A. Burt in 1847, thence down the main channel of the Montreal River, being sometimes known as the East Branch of the Montreal River, to the mouth thereof.

The cost of this proceeding in this court shall be divided equally between the parties.

The clerk of this court may enter the foregoing decree for record.

By the Court:

——— ———,

Chief Justice.

EXHIBIT C.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

Original Number 9. In Equity.

STATE OF MICHIGAN, *Plaintiff*,

vs.

STATE OF WISCONSIN, *Defendant*.

The above named plaintiff now comes and objects to the form and substance of the decree proposed by the defendant in said cause for the reasons that the provisions of said decree are contrary to the manifest intentions of this court as expressed in its opinion and are against the rights of the plaintiff.

FIRST OBJECTION.

That the description in said decree is in the reverse order from that given in the opinion and in the statutory enactments and that as a result thereof plaintiff would be deprived of jurisdiction over an area of considerable extent in the waters of Green Bay and in that section of the Menominee River known as the Quinnesec Falls, and that the description of the boundary through Green Bay is too indefinite and uncertain and should be by courses and distances as shown upon the Government charts in evidence in the case.

SECOND OBJECTION.

That the said proposed decree does not in any way define what are to be considered islands in the Menominee River and that by the language of said decree the rights of plaintiff to the lands now held by it known as Merrymans Island and Sugar Island are jeopardized.

ANDREW B. DOUGHERTY,
Attorney General of Michigan,
CARL D. MOSIER,
Assistant Attorney General of Michigan,
MEREDITH P. SAWYER,
Special Counsel,
Attorneys for Plaintiff.

EXHIBIT D.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

Original Number 9. In Equity.

STATE OF MICHIGAN, *Plaintiff*,

vs.

STATE OF WISCONSIN, *Defendant*.

MOTION TO AMEND PROPOSED DECREE.

Comes now the said plaintiff and moves the court to amend the proposed decree heretofore filed by defendant by striking out that portion of said decree describing the boundary between the plaintiff and defendant states and insert in lieu thereof the following:

> "From Lake Superior through the middle of the main channel of the Montreal River, to the head waters thereof, as established in the survey of Captain Cram at the Junction of Pine River and Lehman's Creek, thence along the line of the survey of William A. Burt, of 1347, to the center of the channel between Middle and South Islands in Lake Vieux Desert, thence continuing along the line of said survey to the shore of Lake Brule, thence along the southerly shore of Lake Brule, to the center of the main channel of the River Brule, thence down the center of the main channel of the Rivers Brule and Menominee, to the center of the harbor entrance of said Menom-

inee River, thence, east by south, seven and one-half miles, to the center of the most usual ship channel of the Green Bay, thence along said channel, north by east, one-eighth east, eight and seven-eighths miles, thence continuing along said ship channel north by east, seven-eighths east, twenty-seven miles, thence continuing along said ship channel, east one-fourth north, ten and one-fourth miles, thence east three-fourths north, to the boundary between the State of Michigan and the State of Wisconsin, in Lake Michigan. Provided, that, that section of the boundary in the Brule and Menominee Rivers, shall follow the main channel thereof, except that where islands occur in the Brule River, and in the Menominee River, down to, and inclusive of the Quinnesec Falls, the line shall pass through the channel nearest the Wisconsin Bank, so as to throw all such islands into Michigan, and where islands occur in the Menominee River below Quinnesec Falls, the line shall pass through the channel nearest the Michigan bank, so as to throw all such islands into Wisconsin. Providing further, that no land now occupied or taxed as a part of the State of Michigan, shall be considered as an island under the provision of the last clause hereof."

ANDREW B. DOUGHERTY,
Attorney General of Michigan,
CARL D. MOSIER,
Assistant Attorney General of Michigan,
MEREDITH P. SAWYER,
Special Counsel,
Attorneys for Plaintiff.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

Original, No. . In Equity.

STATE OF WISCONSIN, PLAINTIFF,

vs.

STATE OF MICHIGAN, DEFENDANT.

MEMORANDUM BRIEF.

It has been broadly declared that a decree can never be impeached by an original bill, but the contrary is settled beyond all doubt. 21 C. J. 796.

Where through fraud, accident, mistake or miscalculation, a judgment is entered for an amount or in terms not intended or inconsistent with the pleadings, equity may give relief on clear and satisfactory proof. Same authority.

Even a unilateral mistake is sufficient to authorize the vacation of the decree.

Hews v. *Hews,* 145 Michigan 247;
Vincent v. *Mathews,* 15 R. I. 509;

Wilding v. *Sanderson*, 2 Ch. 534, 21 C. J. 816, 968 (5).

We have been unable to find a case where the facts are similar. It would seem, however, that equity will permit a correction of a decree so as to carry into effect a decision where no new rights have been acquired and none lost by reason of the entry of the erroneous decree, entered by reason of mutual mistake of the parties in interest.

The plaintiff has acted in good faith in this matter. The delay is excusable as an attempt was made to settle the dispute as to corrections that should be made in the decree, so as to avoid further litigation.

The attorneys had no authority to agree to enter a decree which was contrary to the decision of the court. The result is particularly important as the parties involved are the people of two sovereign States. To hold that the court is powerless in this case to grant relief is to deny justice and equity to the people, because of mistakes mutually and inadvertently made by their attorneys in the former writ.

JOHN W. REYNOLDS,
Attorney General of Wisconsin,
J. E. MESSERSCHMIDT,
Assistant Attorney General,
Attorneys for Plaintiff.

FILE COPY

DEC 27 1932

CHARLES ELMORE CR

SUPREME COURT
of the
UNITED STATES

October Term, 1932

Original No. 12 In Equity

STATE OF WISCONSIN,
Plaintiff,

vs.

STATE OF MICHIGAN,
Defendant.

ANSWER TO BILL OF COMPLAINT

PAUL W. VOORHIES,
Attorney General of Michigan,

EDWARD A. BILITZKE,
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Business Address:
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FRANKLIN DEKLEINE CO., PRINTERS AND BINDERS, LANSING

SUPREME COURT
of the
UNITED STATES

October Term, 1932

Original No. In Equity

STATE OF WISCONSIN,
Plaintiff,
vs.
STATE OF MICHIGAN,
Defendant.

ANSWER TO BILL OF COMPLAINT.

Now comes the above named defendant the State of Michigan by Paul W. Voorhies, Attorney General, Edward A. Bilitzke, Assistant Attorney General, and Meredith P. Sawyer, of Counsel, and for answer to the bill of complaint of the plaintiff, State of Wisconsin, says—

I.

Defendant admits the allegations of Paragraph I of this bill of complaint.

II.

Answering the allegations of Paragraph II of the bill of complaint defendant admits that the plaintiff, State of Wisconsin, submitted a form of decree as therein alleged, and that the State of Michigan entered objections thereto and submitted a motion to amend the proposed decree as therein alleged, and that many conferences were held by the attorneys and technical witnesses; but denies that as a result of said conferences the attorneys for Michigan submitted a proposed draft of a boundary description drafted by Thomas R. Hasley, City Engineer of Menominee, and in this respect alleges that the draft of the decree was prepared in the office of Mr. Justice Sutherland of the Supreme Court. Defendant further alleges that the description in the decree covering Green Bay is not technical, but is and was intended to be taken direct from the United State Government charts in evidence in the case, with the exception of the first course and distance, which was taken from the testimony of Thomas R. Hasley in the record, and in this respect defendant alleges that the said decree, with the exception of one typographical error, is correct and describes a line which is well known and can be readily located through the waters of Green Bay. Defendant further alleges that the testimony of Thomas R. Hasley and the courses and distances given on the charts in evidence in the case are correct, but that an error occurred in the said decree in the courses and distances, describing the boundary through Green Bay, in that the third course is described as North *by* East seven-eighths East, whereas the course intended as shown on the chart is *Northeast* seven-eighths East.

Defendant positively alleges that said error is apparent upon the face of the decree by reason of the fact that

the said decree describes said boundary through Green Bay as passing from the harbor entrance of the Menominee River in a direct line to the most usual ship channel of Green Bay passing to the north of Green Island and westerly of Chambers Island and through the Rock Island passage into Lake Michigan. The above description refers to natural monuments and so far as the courses there delineated may differ from the course and distances given, the monuments should control. A brief examination of the charts will show that eliminating the word "by" thereby changing the third course to read "Northeast seven-eighths East" reconciles the discrepancy. The resulting line follows the charted sailing course passing westerly of Chambers Island and through the Rock Island passage into Lake Michigan.

Defendant admits that the decree was entered as therein alleged, but denies that there was any error therein other than as above set forth and as pointed out in the succeeding paragraphs hereof.

III.

Answering paragraph III of said bill of complaint, defendant admits that the decree was entered as therein set forth and admits that in addition to the error in the courses set forth in the last mentioned paragraph the said decree contains a further error in the description of the land known as Sugar Island, and in this connection the defendant positively alleges that the description there attributed to Sugar Island was furnished to Mr. Robert M. Reiser, Special Counsel for the State of Wisconsin, by a Mr. Hillis, City Engineer of Marinette, Wisconsin; and that the same was received by telephone or telegram while the attorneys were at Washington in conference settling the terms of said decree before Mr. Justice

Sutherland. That the defendant relied upon the information so furnished and was misled thereby.

Defendant alleges that the plaintiff, State of Wisconsin, filed in this court its motion to modify the decree in the above case which was answered by this defendant, State of Michigan, at the October term, and that in said motion no mention was made of this error relative to the description defining Sugar Island, and this error did not come to the attention of this defendant until the filing of this bill of complaint; and in this respect defendant alleges that the said description is erroneous only because it assumes that land outside the boundary line of the lots contained in the Michigan Public Survey, should be included as a part of the lots, and the defendant alleges that the land known as Sugar Island and meant to be affected by said decree is unsurveyed land lying contiguous to the descriptions of the Michigan Public Survey contained in the said decree.

IV.

Answering the allegations of Paragraph IV of the bill of complaint, defendant admits that the quotations from the opinion there set forth are true, but denies their application to the present situation, and in this respect alleges that there was never any claim on the part of the State of Wisconsin, defendant in said original suit, bearing upon the course of the boundary in Green Bay, other than as to jurisdiction over the islands involved, until after the filing of said opinion.

V.

Answering the allegations of Paragraph V, the defendant denies all facts therein set forth, and insists that the

decree does describe the boundary through Green Bay as determined in the opinion, except for said typographical error.

Defendant further alleges in respect thereto that at no time during the pendency of the said original suit in which this defendant was plaintiff did the defendant, the State of Wisconsin, ask for any affirmative relief against this defendant, then plaintiff, or make or assert any claims such as those asserted in said Paragraph V.

VI.

Answering the allegations of Paragraph VI, the defendant again denies that the State of Wisconsin ever took any position during the trial with reference to the boundary line between the mouth of the Menominee River and the most usual ship channel in Green Bay, and in this respect the defendant alleges that throughout the trial the issue between the parties was jurisdiction over the islands in Green Bay and in the entrance thereto, and that the entire effort of both parties was directed at the determination of the most usual ship channel with relation to these islands, and that it was a conceded fact that there was no ship channel entering the Menominee River at the time involved, and all testimony and arguments were directed at the ship channels passing from Lake Michigan to the City of Green Bay at the foot of the Bay, and it was only after the filing of the opinion that attention was directed to the matter of description of the line from the mouth of the Menominee River to the ship channel adopted by the court in its opinion.

Plaintiff positively alleges that the position of Wisconsin in relation thereto as shown in the brief of Wisconsin on page 20, wherein the claim of the State of Wisconsin in this respect is stated as follows:

"Thence * * * to the center of the most usual ship channel * * * ".

And on page 22 it is further claimed that the most usual ship channel was the one passing from Green Bay City west of Chambers Island and through the Rock Island passage.

In this connection defendant here makes reference to the chart of the north end of Lake Michigan and Green Bay, a photostatic copy thereof marked Exhibit A, is hereto attached. This chart is substantially a duplicate of Exhibit A attached to the bill of complaint in this case, with the exception that we have placed upon it by a heavy line marked A. H. O. Q. S. R., the boundary line as it was intended to be defined by courses and distances in said decree, and as it actually was defined in said decree, by monuments, this line being placed over the sailing courses appearing on said chart, with the exception of that portion of the line passing from the mouth of the Menominee River to the sailing course passing westerly of Chambers Island. This initial course and distance was taken from the testimony of Thomas R. Hasley, as above set forth, and is correct.

In this respect defendant further alleges that at the time counsel for the respective parties were in attendance before Mr. Justice Sutherland for the purpose of settling the terms of said decree, the issue as to the description of the line from the mouth of the Menominee River to the ship channel was fully discussed, and the defendants were given full notice of it through the motion to amend the proposed decree made by the State of Michigan and filed in said cause, and the argument and brief in support thereof, quotations being here made from page 5 of said argument and brief—

"FIRST TRACT

"The language of the Michigan Enabling Act, 'down the main channel of the Menominee River to the middle of the most usual ship channel of Green Bay', is the basis for Michigan's claim.

"This language is the effective grant never having been altered by enactment or use.

"Michigan claims for it a construction that the line upon entering Green Bay at the mouth of the Menominee shall pass in a direct course to the middle of the most usual ship channel of Green Bay.

"This construction is in accord with the calls of the Wisconsin Enabling Act, where in a reverse order the boundary in the Green Bay section is as follows:

" 'Thence running to the boundary line of the State of Michigan through Lake Michigan, Green Bay, to the mouth of the Menominee River.'

"The calls of both acts contemplate that the line from the mouth of the Menominee River shall be a straight line, therefore the shortest possible distance from that point to the 'center of the most usual ship channel of Green Bay'. Viewed in the light of the shipping at the time of the admission of both states, as shown by the record, there can be no question but what the 'most usual ship channel of Green Bay' was on the course extending lengthwise of the bay, and as shown as the charted course by Plaintiff's Exhibits 106 and 107. Plaintiff therefore asks that the boundary from Menominee harbor pass along the line at right angles to this western channel course of Green Bay as given on the charts and thence along the charted course. (Plaintiff's Exhibits 106 and 107)."

Defendant further alleges that at the time said question was under discussion, a further issue was raised by the then plaintiff, State of Michigan, as to the location of the line in the harbor of the City of Menominee, and

that aside from the dispute then existing as to the jurisdiction of Sugar Island, the plaintiff called to the defendant's attention the fact that improvements in the Menominee River by way of dredging and construction of harbor piers had so changed the entrance to said river that if the boundary were to pass down the center of the channel of said river to its mouth as it existed in 1836, the entire present channel of said river would be in Michigan.

In explanation of this claim, defendant, has caused to be attached hereto a composite map, marked Exhibit B, which has been prepared for the purpose, from the United States Government Chart No. 723, having the land lines taken from the government land office plat for the respective states superimposed with dotted lines. The location of the boundary, if it were to be placed following the language of the Enabling Act and opinion, through the middle of the main channel as it existed in 1836, is shown upon this map by a dashed line, and attention is called to the fact that it leaves the entire harbor entrance in Michigan, and that some built up property now and always considered to be Wisconsin territory would be on the Michigan side of such line.

This may further shows the location of the land known as Sugar Island as shown upon the government land office plat and by a heavy line the location of the boundary as fixed in the decree.

Defendant positively alleges that in the course of said meeting this situation and the location of the line from the harbor entrance to the ship channel were under discussion at the same time, and it was agreed by all parties in interest that it would not be advantageous to either party to have the boundary other than in the middle of the navigable channel of said river, and that it was unfair to the residents of Michigan that the said boundary

should turn north immediately after leaving the harbor entrance, and it was thereupon agreed between counsel in the presence of Mr. Justice Sutherland that the definition as contained in the decree should be adopted. That in this respect Michigan has relinquished to the State of Wisconsin valuable property over which, under the terms of said opinion, it might have claimed dominion.

Further answering the allegations of Paragraph VI, defendant says that the discussion therein contained bearing upon the language "main channel" and "most usual ship channel" is immaterial because the court adopted the courses given upon the government charts as being the best evidence of the location of the line through the various passages.

VII.

Answering the allegations of paragraph 7 of plaintiff's bill of complaint, this defendant admits that the language describing Sugar Island is erroneous as there alleged, but repeats that the said error consists only in that unsurveyed land is treated as being a part of adjoining lots according to public survey, and in this respect defendant calls attention to the fact that the proposal in respect thereto made by the State of Michigan in its proposed amendments to the decree, as shown on page 4 thereof, read as follows:

> "Provided further, That no land now occupied or taxed as a part of the State of Michigan, shall be considered as an island under the provisions of the last clause hereof."

In explanation of this situation, the defendant alleges that during the trial and argument of said cause, the plaintiff herein, defendant therein, State of Wisconsin,

took the position that Wisconsin had had possession of a certain part of the island in the Menominee River below Quinnessec Falls. That color of title to all islands in the Menominee River below Quinnessec Falls was given to the State of Wisconsin by its enabling act, and that possession of a part of them under such color of title extended its rights to all of them in the absence of actual adverse possession of any part of the tract so described by Michigan.

Michigan on the other hand took the position that it was and had been in possession of three islands in the Menominee River below Quinnessec Falls.

The court adopted the position of Wisconsin in its opinion and overrruled the claim of Michigan by finding that the so-called inlands in the Menominee River below Quinnessec Falls, of which Michigan was in undisputed possession, were not in fact islands. This finding is to be found in the opinion in the following language, after a discussion of the situation relating to Merryman's Island:

> "The fact is that the tract was originally considered to be an island and, consequently, surveyed as a part of Wisconsin. Upon further investigation, it was found by the United States surveyor not to be an island, but, in reality, a part of the Michigan mainland. The Wisconsin survey was, accordingly, cancelled and the title of Michigan thereafter fully conceded. Two other so-called islands of a small area in the same vicinity are in the same situation."

The basis of the entire opinion was the doctrine of acquiescence and it was entirely foreign to expect that either State might by a defining of the line in the decree acquire sovereignty over any territory over which the other State had or was actually exercising jurisdiction

and the purpose of defining the line by decree was to establish the boundary in those portions where by reason of open water or unoccupancy no boundary had actually been fixed by user. The court therefore properly decreed that the land known as Sugar Island was mainland of Michigan, and the only error in respect thereto is its inclusion in lots of Michigan public survey when, as a matter of fact, it had not been and never has been surveyed.

Further answering the allegations of said paragraph, this defendant alleges that the references therein to Grassy Island and Carpenter-Cook Island are immaterial and irrelevant and that this defendant is unable to determine therefrom what land or territory is involved, and in this respect defendant alleges that all of the area between the bank lines of the Menominee River at or near the mouth thereof, as shown upon Exhibit B hereto attached, was sub-aqueous land except the land known and described as Sugar Island. That the boundary was defined with reference thereto, and that the creation of islands or mainland by filling or by recession of the waters could in no way affect the location of the boundary line as placed in reference to said bank line and said Sugar Island, and that all of the islands on built up ground now located in said harbor are to be disregarded in connection with the location of said line as defined by Congress because they constitute developments on sub-aqueous land over which the sovereignty must be determined by the facts as they existed in 1836. In this respect this defendant insists that the adjustment of boundary agreed to between counsel and carried into the language of said decree defining said line down the center of the main channel of the Menominee River to the center of the harbor entrance is a proper adjustment and has had the approval of this court and should not be dis-

turbed. Defendant further alleges that by reason of its recent discovery of the fact that the land known as Sugar Island is not contained within any Michigan public survey that the same should be surveyed in connection with the Michigan public surveys by and under the direction of this court.

VIII.

Answering the allegations of paragraph 8, defendant alleges that the two errors heretofore admitted by this defendant are apparent upon the face of the decree and should be corrected by the elimination of the word "by" from the erroneous course in the description of the boundary in Green Bay and by the elimination of the erroneous description as to location of Sugar Island and a survey of said land under the direction of this court, and defendant admits that these two errors were mutual mistakes, inadvertently made, and admits that they were not discovered, one until 1929, and the latter one by this defendant until the filing of this bill.

This defendant admits that conferences have been held between representatives of Michigan and Wisconsin endeavoring to come to some agreement in regard to the said first mentioned error, and that it has been impossible to arrive at such an agreement.

The defendant denies that the State of Michigan, by its Attorney General or by any other person, ever took the position that they would not raise any objection to the jurisdiction of this court to change the substance of said decree. In that respect defendant alleges that, the State of Michigan, through its proper officers, has at all times been ready and willing to enter into a stipulation to correct said decree by the elimination of the word "by" erroneously included in the description of the third

course of the boundary in Green Bay which was the only error in said decree known to this defendant up to the time of filing of this bill of complaint, and this defendant is now ready and willing to agree with the State of Wisconsin upon the elimination of the erroneous description of the location of Sugar Island which was placed in said decree at the instance of the State of Wisconsin and upon a proper determination of the location of said land by survey under the order and direction of this court, and the defendant insists that other than as above set forth the said decree contains no error and should not be disturbed.

This defendant admits that the State of Wisconsin prepared, filed and served a motion for modification of the decree as therein alleged and that attorneys for the State of Michigan in answering said motion raised the question of the jurisdiction of the court. In this respect this defendant insists that it was bound so to do since by said motion the State of Wisconsin attempted to modify said decree in substance and not merely to correct the typographical error therein contained.

Answering the allegation of paragraph 9, this defendant alleges that as to the triangle of water in dispute, actual jurisdiction thereof, or of a portion thereof, has been exercised by the State of Michigan for many years and that following the entering of said decree, upon the occasion of ice forming upon Green Bay, the conservation authorities of the State of Michigan discovered residents of the State of Wisconsin fishing in said area without complying with the laws of the State of Michigan in relation to procuring licenses and manner of fishing. That thereupon a considerable controversy arose between the authorities of the two states and that the said Wisconsin fishermen withdrew from said area. That there was some discussion between the Governors and

Attorneys General of the two states: that no prosecutions were instituted because of the claimed violation on the understanding that Wisconsin was to make an effort to assert its position but that nevertheless the State of Michigan has continued during all of said period and now does exercise dominion over the said triangle of water and the fishing therein.

In this respect defendant alleges that the said issue has become important by reason of circumstances unknown to the parties at the time of the entering of said decree. That when ice forms upon Green Bay the same is kept open and impassable on a course from the Menominee harbor to Sturgeon Bay as shown by the chart, Exhibit A hereto attached, by the dotted line giving a course southeast three-eighths east, which is the sailing course of the car ferries of the Wabash line. By means of ice crushers an open ferry lane is now maintained during the winter, thereby cutting off from the residents of the State of Wisconsin any opportunity to pass out onto the ice opposite the City of Marinette and making it necessary for them to cross into the State of Michigan before entering on the Bay to carry on their fishing operations through the ice.

X.

Answering the allegations of paragraph 10 of said bill of complaint, this defendant denies that the plaintiff, State of Wisconsin, is in any way damaged by the said decree other than the damage occasioned to both parties through the uncertainty due to the two errors heretofore admitted.

Defendant specifically denies that Wisconsin thereby loses jurisdiction over any area which had ever been under her jurisdiction and with particular relation to the 35 square miles of fishing area opposite the city of

Menominee, the defendant denies that the same was ever under the jurisdiction of Wisconsin and positively alleges that most or all thereof has been continuously under the jurisdiction of Michigan for upwards of fifty years.

The defendant, State of Michigan, specifically denies that the plaintiff, State of Wisconsin, was damaged by having a part of Grassy Island under the jurisdiction of Michigan, and in this respect alleges that the so-called Grassy Island was formed by the recession of waters and the filling of sub-aqueous property, sovereignty, over which, was given to Michigan by the Michigan enabling act and confirmed by the opinion and decree of this court. The defendant further denies that the plaintiff, State of Wisconsin, was damaged by the uncertainty of the rights of its citizens caused by the uncertainty of the boundaries erroneously fixed by the said decree other than as above set forth, which damage is common to both parties hereto.

The defendant therefore prays:

1. That the said decree may be modified and corrected by this court to the extent hereinbefore set forth, that is to say:

(a) That the erroneous course given in said decree describing the boundary in Green Bay be corrected by elimination of the word "by" so that the courses and distances through Green Bay shall read as follows:

> "From a point midway between the outer ends of the Menominee River piers, thence east by south, seven and one-half miles to the center of the most usual ship channel of Green Bay, thence along said ship channel north by east one-eighth east, eight and seven-eighths miles, thence continuing along said ship channel northeast seven-eighths east, twenty-seven miles, thence continuing along said ship channel, east one-fourth north, ten and one-fourth miles, thence east three-fourths north to the boundary between the State of Michigan and the State of Wisconsin in the middle of Lake Michigan."

(b) That the description of the location of Sugar Island as contained in said decree be eliminated so that said decree will read in respect thereto as follows:

> "And the land known as Sugar Island is determined to be part of the mainland of Michigan"

and in this respect defendant insists that by reason of the great uncertainty and alarm caused by the exaggerated claims of the plaintiff, State of Wisconsin, that the same should for all time be quieted and the rights of the parties definitely fixed by an accurate and definite survey of this area heretofore known and referred to only as Sugar Island but now consisting of a considerable area by reason of the building up of sub-aqueous property, and defendant therefore prays that a survey thereof be had under the order and direction of this court.

2. That other than as above set forth, the prayers of plaintiff's bill of complaint be denied and that the plaintiff be refused and denied any affirmative relief against this defendant, the State of Michigan, by reason of the fact that the matters and things set forth and alleged in said bill of complaint are res adjudicata under the opinion and decree heretofore rendered by this court in this matter, and that other than as above set forth, the said bill of complaint be dismissed and the claims of said plaintiff be denied and the rights of this defendant to the territory claimed by said State in said bill of complaint be forever quieted in this defendant.

STATE OF MICHIGAN,
PAUL W. VOORHIES,
Attorney General,
EDWARD A. BILITZKE,
Assistant Attorney General.
MEREDITH P. SAWYER,
Of Counsel.

Exhibit A

SURVEY OF THE NORTHERN AND NORTHWESTERN LAKES

Made in obedience to Acts of Congress

and orders of

THE CHIEF OF ENGINEERS, U.S. ARMY

NORTH END OF LAKE MICHIGAN

INCLUDING

GREEN BAY

Prepared and first issued under the direction of

Major CHARLES KELLER, Corps of Engineers, U.S. Army, in 1907-1908

Fifth edition revised and published under the direction of

Colonel R.M.MARKHAM, Corps of Engineers, U.S. Army, in

1924

SCALE 1:240,000

AUTHORITIES

U.S. LAKE SURVEY

Original Surveys in 1821 1822, 1860 1860 and 1870

Later Surveys Soundings of all other surveys to the date of issue, and plotted aids to Coastal and Harbor Charts from which this chart has been compiled

NOTES

Soundings are referred to Standard Low Water Datum, the table of comparative elevations of water levels

Water areas with depths to 21 feet are tinted as blue. Depths within tinted areas are in feet

Shore on restricted areas are in fathoms

Latitudes and longitudes are based on the "North American Datum"

The above line to shows an isocline of 21 feet of variation

Figures on permanent landmarks elevations in feet above mean low level

Chart prepared under the supervision of Andrew J. Smith, Assistant Engineer

Comparative Elevations of Water Levels on Lake Michigan

referred to Mean Sea Level

(adjusted Levels of 1903.)

High Water of 1838	583.89 ft.
Mean range 1860-1903, both inclusive	581.99 ft.
Low water datum the Harbor Improvements (1903)	579.89 ft.
Lowest recorded monthly mean, (for 1819)	576.80 ft.
Plane of reference of this chart (Standard Low Water)	576.50 ft.

K E. 1/4 N, 10 1/4 MI.

N. BY E. 7/8 E, 27 MI.

NE 7/8 E, 22 MI.

7/8 MI.

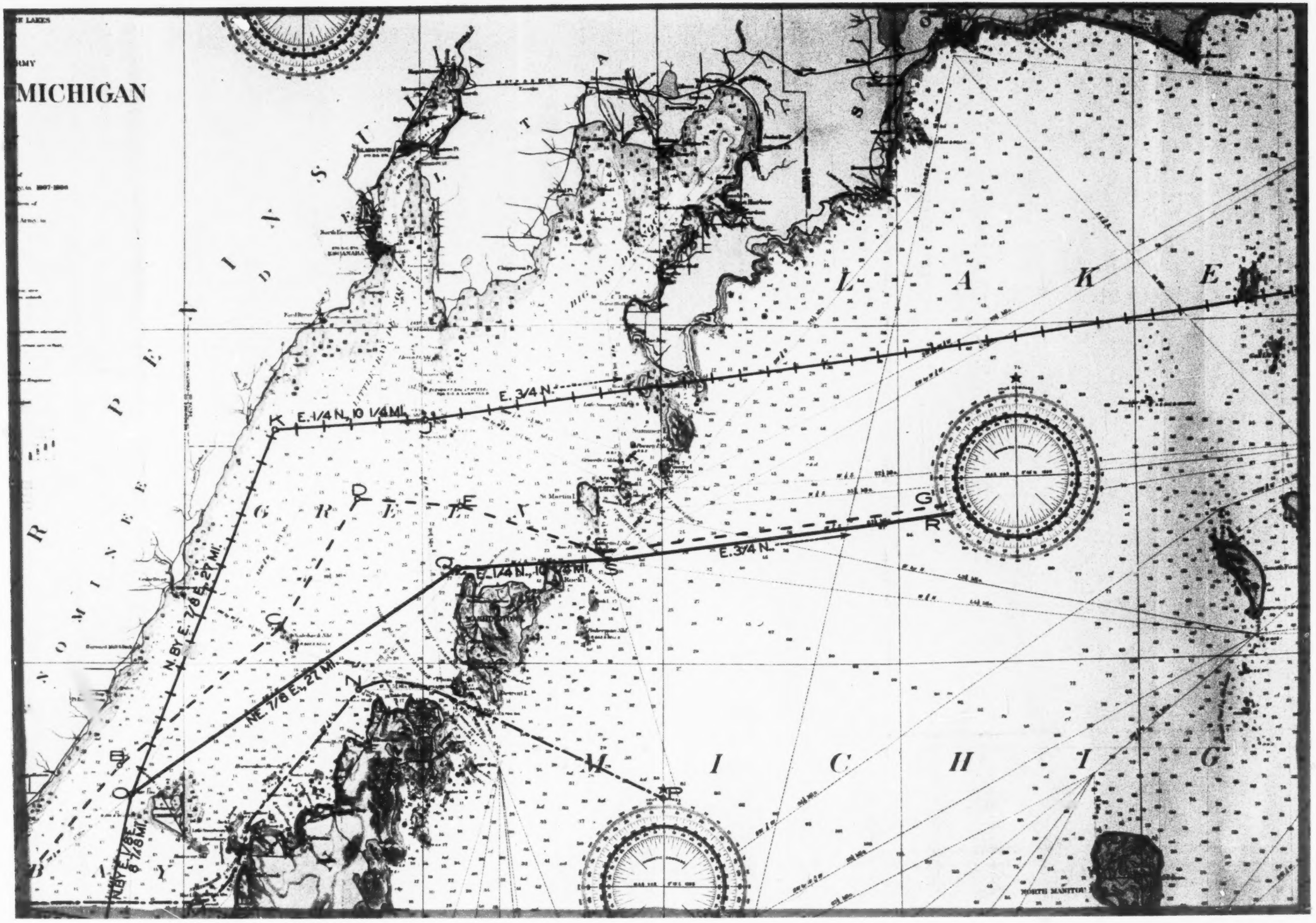
U P P E R P E N I N S U L A

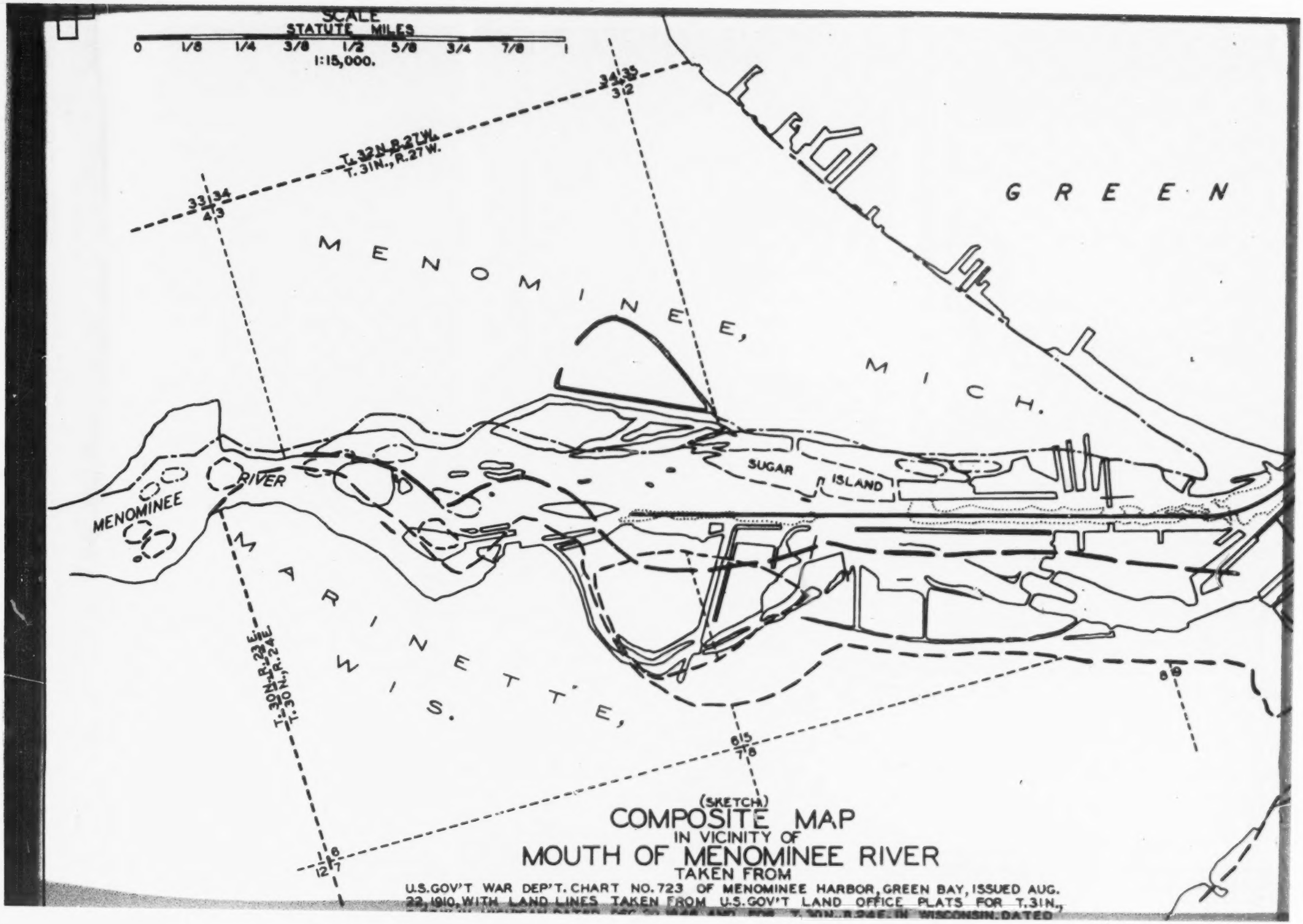
G R E E N B A Y

L I T T L E T R A V E R S E B A Y

M A N I S T I Q U E B A Y

SCALE OF FEET


MICHIGAN
L A K E
M I C H I G
E. 3/4 N.
E. 1/4 N., 10 1/4 MI.
E. 3/4 N.
E. 1/4 N., 10 1/4 MI.
N. BY E. 7/8 E., 27 MI.
NE. 7/8 E., 27 MI.
N. BY E. 7/8 E.
8 7/8 MI.



(SKETCH)

COMPOSITE MAP
IN VICINITY OF
MOUTH OF MENOMINEE RIVER
TAKEN FROM

U.S. GOV'T WAR DEP'T. CHART NO. 723 OF MENOMINEE HARBOR, GREEN BAY, ISSUED AUG. 22, 1910, WITH LAND LINES TAKEN FROM U.S. GOV'T LAND OFFICE PLATS FOR T. 31 N., [illegible] T. 31 N., R. 24 E. IN WISCONSIN. DATED

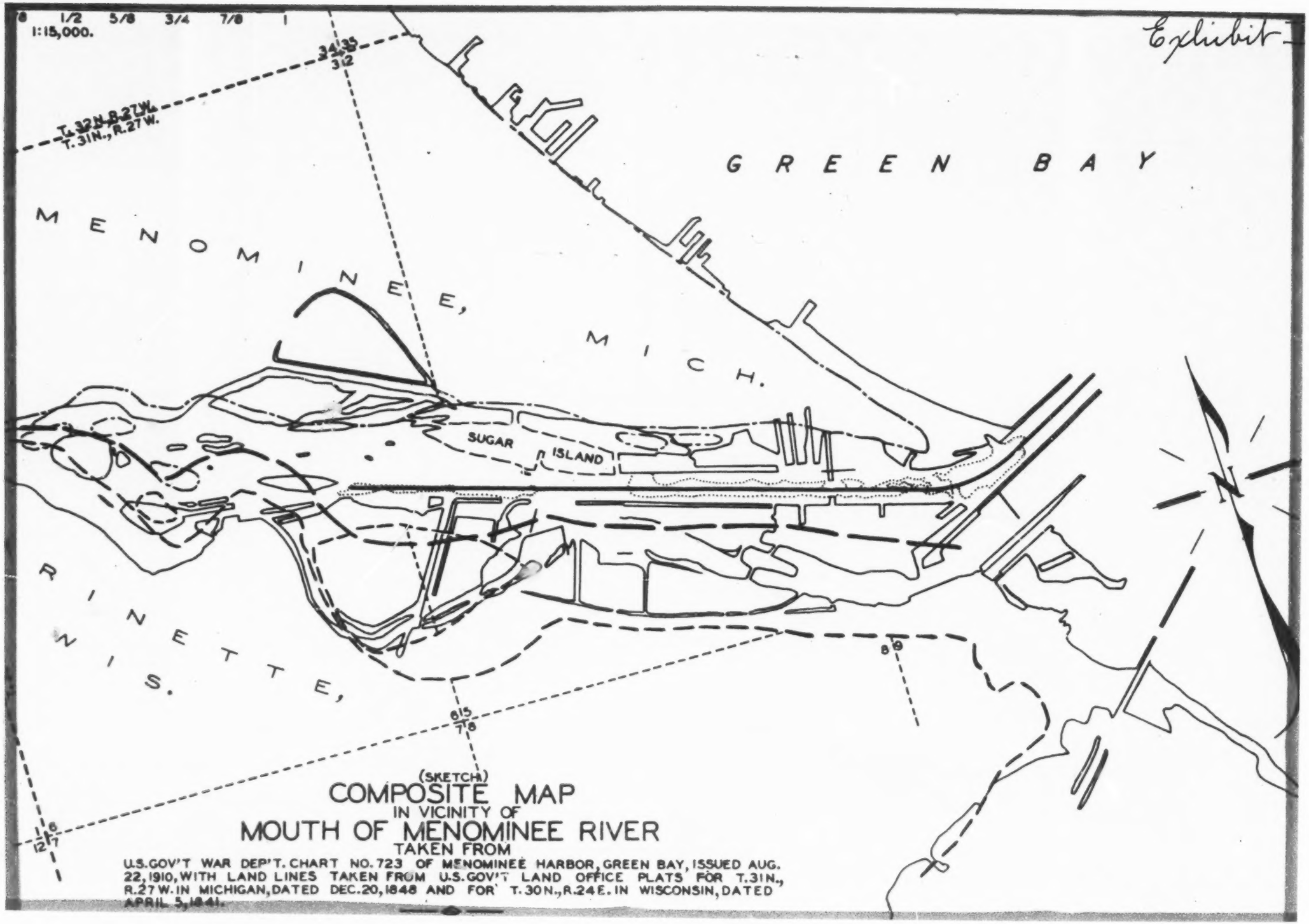


Exhibit
0 1/2 5/8 3/4 7/8 1
1:15,000.
T. 32 N. R. 27 W.
T. 31 N., R. 27 W.
GREEN BAY
MENOMINEE, MICH.
SUGAR ISLAND
RINETTE, WIS.
N
(SKETCH)
COMPOSITE MAP
IN VICINITY OF
MOUTH OF MENOMINEE RIVER
TAKEN FROM
U.S. GOV'T WAR DEP'T. CHART NO. 723 OF MENOMINEE HARBOR, GREEN BAY, ISSUED AUG. 22, 1910, WITH LAND LINES TAKEN FROM U.S. GOV'T LAND OFFICE PLATS FOR T. 31 N., R. 27 W. IN MICHIGAN, DATED DEC. 20, 1848 AND FOR T. 30 N., R. 24 E. IN WISCONSIN, DATED APRIL 5, 1841.

FILE COPY

Office Supreme Court
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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

Original, No. ~~49~~ 12 In Equity

STATE OF WISCONSIN,

Plaintiff,

v.

STATE OF MICHIGAN,

Defendant.

REPLY TO DEFENDANT'S ANSWER TO BILL OF COMPLAINT

JAMES E. FINNEGAN,
Attorney General of Wisconsin,

J. E. MESSERSCHMIDT,
Assistant Attorney General,

Attorneys for the State of Wisconsin.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

Original, No. 20 — In Equity

STATE OF WISCONSIN,

Plaintiff,

v.

STATE OF MICHIGAN,

Defendant.

REPLY TO DEFENDANT'S ANSWER TO BILL OF COMPLAINT

Now comes the above named plaintiff, the State of Wisconsin, by James E. Finnegan, Attorney General, and J. E. Messerschmidt, Assistant Attorney General, and for reply to the answer to the bill of complaint herein says:

I.

Replying to the allegations of paragraph 2 of the defendant's answer to the bill of complaint, plaintiff herein admits that the final draft of the decree was prepared in

one of the offices of Mr. Justice Sutherland of the Supreme Court in the absence of Mr. Sutherland, and alleges that the erroneous description of the boundary in the Green Bay section was taken from the draft of the proposed decree submitted by the State of Michigan, a copy of which is made a part of the bill of complaint and marked Exhibit "D"; and that the counsel for the State of Wisconsin were informed that said description was drafted by Thomas R. Hasley, city engineer of the city of Menominee, Michigan.

Plaintiff denies the allegation of the answer that with the exception of one typographical error the description in the decree is correct, and describes a line which is well known.

Plaintiff alleges that he has no knowledge or information that an error occurred in said decree in the courses and distances describing the boundary through Green Bay by the insertion of the word "by" between north and east in the third course and, therefore, denies the same. Plaintiff denies that by eliminating the said word "by" thereby changing the third course to read "northeast seven-eighths east", reconciles the discrepancy, and states that he has no knowledge or information that the line then follows the chartered sailing course, passing westerly of Chambers Island and through the Rock Island passage into Lake Michigan; and plaintiff alleges that the description by courses and distances in the Green Bay section, even after the elimination of the word "by", does not give a description that complies and is in conformity with the decision of the court in said original suit.

II.

Replying to the allegations of paragraph 3 of the answer to the bill of complaint, plaintiff alleges that it has no knowledge that the description concerning Sugar Island

was furnished to Mr. Robert M. Reiser by a Mr. Hillis, and that the same was received by telephone or telegram and therefore denies the same. This plaintiff denies the allegation that the error concerning Sugar Island did not come to the attention of the defendant until the filing of the bill of complaint, but alleges that this error became known to the defendant at the same time that the error became known concerning the error in the description in Green Bay in 1929.

III.

Replying to the allegations of paragraph 4 of the answer to the bill of complaint, plaintiff denies that there never was any claim on the part of the State of Wisconsin, the defendant in the said original suit, bearing upon the course of the boundary in Green Bay, other than as a jurisdiction over the islands involved until after the filing of said opinion, but alleges the fact to be that the main contention was to ascertain whether the so-called Strawberry channel was the main channel of Green Bay or the channel which passed from the mouth of the Menominee river, thence between Chambers Island and the Michigan mainland and then in a northerly direction opposite to the channel between St. Martin's Island and Rock Island then into Lake Michigan. The State of Wisconsin, the defendant in that suit, introduced evidence of shipping courses that passed through said last named channel to prove that said channel was the main shipping channel of Green Bay, but not for the purpose of showing the boundary line to follow the shipping course, and alleges the fact to be that the shipping courses in said main channel of Green Bay have varied at different times and that such shipping courses are not the line of boundary between the two states in said Green Bay, but that the center of

the main channel is the boundary through said Green Bay. This is clear from the description in the enabling act of both the states of Wisconsin and Michigan.

Plaintiff, in paragraph 1 of the bill of complaint in the original suit, refers to the enabling act, passed by Congress, approved June 15, 1836, on the admission of the State of Michigan into the union and described a portion of the boundary of Michigan pertinent to the issues therein, a part of said description which is pertinent to the issues in the present suit was as follows:

> "* * * thence in a direct line to the nearest headwater of the Menominee river; thence through the middle of that fork of said river first touched by said line, to the main channel of said Menominee river; thence down the center of the main channel of the same, to the center of the most usual ship channel of the Green Bay of Lake Michigan; thence through the center of the most usual ship channel of said Bay to the middle of Lake Michigan; * * *."

In paragraph 15 of the bill of complaint of the State of Michigan in the original action, the identical quotation is given from the new constitution of the State of Michigan adopted in 1850; so also in the proposed constitution of Michigan of the year 1867, and again in paragraph 16, the identical quotation is given from the new constitution adopted in 1908.

Plaintiff alleges in paragraph 17 of the bill of complaint of the State of Michigan in the original suit, that the part of the descripion which is here pertinent of the boundary between Michigan and Wisconsin in the enabling act of the State of Wisconsin, is as follows:

> "* * * beginning at the northeast corner of the State of Illinois, that is to say, at a point in the center of Lake Michigan, where the line of 42 degrees and

30 minutes of north latitude crosses the same; thence running with the boundary line of the State of Michigan through Lake Michigan, Green Bay, to the mouth of the Menominee River; thence up the main channel of said river to the Brule River; * * *."

It thus appears that the description of the boundary between the State of Michigan and the State of Wisconsin, as given in both enabling acts of the State of Michigan and that of Wisconsin, calls for the boundary from the mouth of the Menominee river to the center of Lake Michigan as passing through the center of the main channel of Green Bay, and that this was the position taken by the State of Michigan in the original action, as well as the position of the State of Wisconsin, so that that question was not litigated as there was no controversy or issue between the two states on that point. This position was also adopted in the decision in the original suit.

Plaintiff alleges that the description as given in the decree does not carry into effect the decision of the court as expressed in the opinion, neither does it carry into effect the accepted boundary line as clearly shown in the description of the boundary of both states.

IV.

Replying to the allegations of paragraph 5 of the answer to the bill of complaint, this plaintiff alleges that the answer herein given to paragraph 4 of the answer as alleged in the preceding paragraph 3 is also applicable to this paragraph.

V.

Replying to the allegations of paragraph 6 of the answer to the bill of complaint, this plaintiff admits that

the issue between the parties in the original action was mainly jurisdiction over the Islands in Green Bay and the entrance thereto, and that the question at issue was whether the so-called Strawberry channel was the main channel of Green Bay or the channel between Chambers Island and the mainland and that between St. Martin's Island and Rock Island, it being conceded according to the expressed language in the enabling acts of both states that when the main channel was definitely fixed that the center of said channel would be the boundary.

It is further admitted that there was no shipping course at the time of the admission of Michigan or Wisconsin entering the Menominee river from Green Bay, but alleges that the main channel of the Bay, the center of which was the boundary of the two states in Green Bay, touched the mouth of the Menominee river. Plaintiff further alleges that nothing contained in the brief of Wisconsin indicates that Wisconsin considered that the shipping courses in Green Bay were synonymous with the main shipping channel. This plaintiff admits that there was discussion with Justice Sutherland as to the formation of the decree concerning Sugar Island and that the representatives of the State of Michigan informed him that they had had control and jurisdiction of Sugar Island for a long period of time, and that in this connection the discussion also brought out that the mouth of the Menominee river had been changed by dredging and that the State of Wisconsin had had possession of the land and buildings thereon south of the present mouth of the river for a long period of time. Justice Sutherland stated at that time that the opinion did not intend to disturb the sovereignty over any territory over which the other state had or was actually exercising jurisdiction, and that the alleged compromise was between giving Sugar Island to the State of Michigan

and that part of the territory south and southwest of the mouth of the Menominee river as changed by the dredging of said mouth of the river to Wisconsin, but denies that there was any compromise as to the waters in Green Bay.

This plaintiff alleges that the description of the boundary in the waters of Green Bay were prepared by the State of Michigan, whose representatives were conversant with the situation in said waters, and that they assured Justice Sutherland and the attorneys for the State of Wisconsin that the technical description as presented by them carried into effect the decision of the court, but this plaintiff alleges the fact to be that said description does not carry into effect the decision of the court and does not carry out the plain wording of the boundary of the state in Green Bay as being in the center of the main channel of said Bay.

This plaintiff alleges that neither the attorneys for the State of Wisconsin nor those of Michigan had any right to change the boundary of the state as determined in the enabling act by any compromise, and that the boundary as fixed in the decree, even after the changing of the word "by" as alleged by the defendant, did in any way carry into effect the decision of the court in the original action.

VI.

Replying to the allegations of paragraph 7 of the answer to the bill of complaint, this plaintiff admits that the basis of the entire opinion was the doctrine of acquiescence, and that the decision did not intend to disturb existing conditions as to jurisdiction. This plaintiff alleges that he has no knowledge as to the allegation that all of the area between the banks of the Menominee river at or near the mouth thereof as shown upon Exhibit "B" of defendant's answer, is subaqueous land except the land known or described as Sugar Island and therefore denies the same

to put the defendant on his proof, and the plaintiff reserving to itself the benefit of all proper admissions and disclosures contained in said paragraph 7 of the defendant's answer joins issue upon said answer and each allegation thereof, and this plaintiff is ready to prove all the matters contained in paragraph 7 of its bill of complaint.

VII.

Replying to the allegations of paragraph 8 of the answer to the bill of complaint, the plaintiff denies that the errors in the description of the boundary in Green Bay and the description and location of Sugar Island are apparent upon the face of the complaint, and denies that the defendant herein did not discover the error as to Sugar Island until the filing of the bill.

VIII.

Replying to the allegations of paragraph 9 of the answer to the bill of complaint, this plaintiff denies that the triangle of the area of water in dispute has been under actual jurisdiction of the state of Michigan for many years or any time prior to the entrance of the decree, and denies that the controversy arose between Wisconsin and Michigan by reason of a lane of open water maintained through the ice, since the decree was entered, but alleges that said lane of open water has been maintained for many years and that the citizens of Wisconsin have fished on said so-called triangle of water for a long period of time prior to the entry of said decree; and denies that the State of Michigan has exercised dominion over the said triangle of water and the fishing therein.

IX.

Replying to the allegations in paragraph 10 of the answer to the bill of complaint, the State of Wisconsin alleges that in addition to the jurisdiction which it loses as alleged in the bill of complaint, if the court should hold that the boundary of the state in Green Bay is as contended for by the defendant herein, then the State of Wisconsin would lose a vast area of water in Green Bay and that the jurisdiction of the State of Wisconsin over a large area of said Green Bay would be taken away; that prior to the entry of the decree herein, Michigan has not exerted any jurisdiction or dominion over any area of Green Bay south and west of the line marking the boundary of the State of Wisconsin to Green Bay, namely, the center of the main channel as alleged and described in the bill of complaint of the plaintiff. As to whether the so-called Grassy Island was formed by the recession of waters and the filling of subaqueous property, this plaintiff does not have sufficient knowledge to form a belief and therefore denies the same.

Plaintiff further alleges as an answer to the demands of the answer of the defendant, that the boundary in Green Bay should be definitely determined, specifically marked, and that Green Bay is a great fishing center and that it is necessary in order to preserve the rights of the party engaged in navigation and fishing thereby, to determine to what laws they are subject in different sections of the Bay; that the fish and game laws of Michigan do not always coincide with those of Wisconsin; that while there are open seasons in Wisconsin there may be closed seasons in the Michigan areas for the same game; that Michigan authorities may require license from fishermen with different fees than Wisconsin; that a great many features of law enforcement point to the conclusion that the line of demarcation between the jurisdiction of the two states should be

in the center of the main channel; that to have the game laws of Michigan enforced within a mile of Washington island is unthinkable, likewise to enforce the Wisconsin game laws within a short distance of the Michigan land is equally objectionable.

Plaintiff further alleges that the shipping course in Green Bay has constantly changed and that at the time when the boundary was fixed as early as 1836 sailing vessels instead of steamers were used in navigation; that these ships had to back against the winds at times and were obliged to stay a respectable distance from the coast; that their course was often a zigzag course, tacking against winds from various directions; that sailing vessels could not pursue a course close to shore for obvious reasons; that the center of the main channel was therefore described as the boundary in the enabling acts of Wisconsin and Michigan.

Plaintiff further alleges that the boundary contended for in the bill of complaint follows the middle of the said main channel of Green Bay; that the starting point is the center of the harbor entrance of said Menominee river starting from the outer end of the pier at Menominee as being in harmony not only with the opinion of the court, but also with the decree as entered; that the next fixed point is a point half way from Chambers island to the Michigan mainland measured from the water's edge at the narrowest channel; that this is a definite point which may be easily determined. The third point is the west end of the Whaleback Shoal which is approximately in the center of the channel extending from the mainland of Michigan and the peninsula in Wisconsin directly east of it; that it is approximately in the center and is selected as a point which may be easily marked. The fourth point is one halfway from the water's edge adjacent at Boyer's Bluff to

the water's edge on the Michigan mainland at the mouth of Bark river. This is a point which is thus definitely and permanently fixed and may be easily ascertained. The fifth point is one half-way from the water's edge at Boyer's Bluff to Driscoll Shoal. What is said as to the fourth point is also applicable to this point. The sixth and last point is the light on St. Martin's Shoal which is approximately in the center of the passage between St. Martin's island and Rock island, and is a point that can be definitely fixed and marked. From said point the boundary goes to the center of Lake Michigan in the same direction as the present decree of the court designates, which follows the course of the ships to the east as pursued in 1836.

It is further alleged that the said main channel of Green Bay is practically navigable in all its area.

JAMES E. FINNEGAN,
Attorney General of Wisconsin,

J. E. MESSERSCHMIDT,
Assistant Attorney General,

Attorneys for the State of Wisconsin.

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CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1932

ORIGINAL, NO. 12 IN EQUITY

STATE OF WISCONSIN,
Plaintiff.

vs.

STATE OF MICHIGAN,
Defendant.

DEFENDANT'S ANSWER TO AFFIRMATIVE ALLEGATIONS OF PLAINTIFF'S REPLY

PATRICK H. O'BRIEN,
Attorney General of Michigan,

MEREDITH P. SAWYER,
Special Counsel,

Attorneys for Defendant.

FRANKLIN DEKLEINE CO., PRINTERS AND BINDERS, LANSING

IN THE SUPREME COURT
of the
UNITED STATES

OCTOBER TERM, 1932

ORIGINAL, NO. 20 IN EQUITY

STATE OF WISCONSIN,
Plaintiff.

vs.

STATE OF MICHIGAN,
Defendant.

DEFENDANT'S ANSWER TO AFFIRMATIVE ALLEGATIONS OF PLAINTIFF'S REPLY

Now comes the above named defendant, the State of Michigan, by Patrick H. O'Brien, Attorney General, and Meredith P. Sawyer, Special Counsel, and for the purpose of traversing certain affirmative allegations in plaintiff's reply to this defendant's answer, says:

—1—

Referring to the allegation in paragraph one (1) of plaintiff's reply to the effect that the erroneous description of the boundary in Green Bay was drafted by Thomas R. Hasley, defendant denies the same and in explanation thereof, reasserts that such error first appears in the courses and distances given in the printed form of Michigan's proposed amendments to Wisconsin's proposed decree and was occasioned by an error in transcribing the courses and distances as given in the testimony of said Thomas R. Hasley and shown upon the plaintiff's exhibits; that such error is typographical only, is readily ascertainable and that when eliminated (the word "by") the decree correctly defines the boundary as it was intended to be determined and is in full accord with the findings and opinion of this court.

That such boundary so defined (with the word "by" eliminated) follows the middle of the main channel of the Menominee River to its mouth, passes thence in a direct line by the shortest possible course to "the middle of the most usual ship channel of the Green Bay of Lake Michigan" and thence follows the middle of the most usual ship channel to the middle of Lake Michigan.

—2—

Referring to the allegations of paragraph two (2) of plaintiff's reply, the defendant reaffirms the allegations of its answer and in further explanation thereof, says: That the decree of this court as written, expresses the determination of the court that the land known as "Sugar Island" was to be treated as mainland of Michigan for the purpose of determining the boundary and that the error therein consists only in defining said land as a part of certain lots of the Government Survey of Mich-

igan, when in fact, said land is outside of the exterior lines of said lots and a channel in said river passes between said land and said lots. Defendant alleges that the location of the meander line of said lots was unknown to defendant until the filing of the Bill of Complaint herein.

—3—

Referring to the allegations of paragraph three (3) of plaintiff's reply, this defendant reasserts that no definite description of the boundary in Green Bay had been considered by either party prior to the filing of the opinion of this court, and denies that Wisconsin offered any evidence of shipping courses that passed from the mouth of the Menominee River as alleged; denies that the Enabling Acts of both States define the boundary as the middle of the main channel of Green Bay; reasserts that such definition is "the middle of the most usual ship channel"; denies that the line here proposed by Wisconsin conforms to such definition and the findings and opinion of this court; and reasserts that the definition of such boundary as contained in the decree of this court, modified by the elimination of the typographical error (the word "by") conforms exactly with such definition, findings and opinion.

In this respect, Michigan alleges that during the trial of the former case the issue was as expressed, jurisdiction over the islands lying between the two main ship channels from Lake Michigan through Green Bay to the Village (now city) of Green Bay. Michigan further alleges that this court declined to determine from the evidence which of these main ship channels was the "most usual ship channel" because as expressed in the opinion, possession of such islands by Wisconsin acquiesced in by Michigan over a long period of time, made

it mandatory that the channel thus adopted by acquiescence be considered the boundary.

These findings were carried into the decree of this court by defining the line of the boundary to be along the sailing courses given on the Government charts through the channels thus determined.

It was first necessary to define the line from the middle of the mouth of the Menominee River to the middle of said ship channel—the definition of the boundary being silent on this sector—it was computed from the chart along the shortest possible line between the monuments. A line from the river mouth at a right angle with the shipping course—the course was computed by angle of departure from the shipping course and the distance scaled from the chart. This definition was in issue between the parties at the time of the settlement of said decree and the position of Michigan in that regard was adopted by the court as being correct in accordance with the definition of the Enabling Acts of both States—the findings and opinion of this court and the concessions and agreement of the parties in relation to alteration of the channel of the Menominee River by dredging.

—4—

Referring to the allegations of paragraph four (4) of plaintiff's reply, defendant here reasserts the allegations of the last paragraph hereof and of paragraph five (5) of its answer.

—5—

Referring to the allegations of paragraph five (5) of plaintiff's reply, defendant denies that the question at issue between the parties was the "main channel of Green Bay" and denies that the center of any main channel of Green Bay touched the mouth of the Menominee

River; denies that the decree of this court was the result of a compromise between the parties as therein set forth; denies that the plain wording of the boundary in Green Bay is the "center of the main channel of said Bay" and admits that the attorneys for neither party had any right to change the boundary by compromise.

In this respect, Michigan alleges that in said former case, Wisconsin claimed to have held possession of certain islands in the Menominee River below Quinnesec Falls. That the Wisconsin Enabling Act proposed a boundary which would place all islands in the Menominee River Below Quinnesec Falls in Wisconsin. That this Enabling Act gave color of title to Wisconsin to all these islands. That under such color of title, Wisconsin's possession of a part of such islands would extend to all of them, *in the absence of actual possession of any of them by Michigan.*

Michigan, on the other hand, contended that it had not acquiesced in such possession because it had always possessed two large islands in said portion of said river, to-wit: Merryman's Island and Sugar Island.

The opinion and decree of this court were to the effect that the lands possessed by Michigan were not islands and, consequently, did not affect Wisconsin's claimed possession, and the boundary was determined according to Wisconsin's claims—safeguarding the interests of Michigan by providing that "Sugar Island" was to be treated as mainland of Michigan—Merryman Island had been surveyed in both States and the Wisconsin survey cancelled, and the island submerged by a hydro-electric development.

At the same time, issue was taken between the parties as to the course of the main channel of the Menominee River near its mouth, having been changed by dredging, and this court had before it the original Government

plats showing bank lines of said river at the time of the first survey, and later Government charts showing the dredged channel in the lower end of said River and into Green Bay, and the location of the ship channel from the City of Green Bay passing west of Chambers Island and through the Rock Island Passage into Lake Michigan, and that this Court, with the expressed approval of both parties, decreed from the evidence at hand and in accord with the theory of acquiescence that the boundary passed through the middle of the dredged channel of the Menominee River, to a point midway between the harbor piers, and thence in a direct line by the shortest possible course to the middle of the ship channel, which had been determined by acquiescence to be the boundary.

—6—

No affirmative allegations appearing in paragraph six (6) of plaintiff's reply, issue thereon is already complete.

—7—

No affirmative allegations appearing in paragraph seven (7) of plaintiff's reply, issue thereon is already complete.

—8—

Referring to the allegations of paragraph eight (8) of plaintiff's reply, defendant denies that the open water lane through the ice of Green Bay was maintained prior to the entry of said decree and denies that citizens of Wisconsin have fished on the water alleged for a long period of time, except as licensed so to do by the State of Michigan.

Referring to the allegations of paragraph nine (9) of plaintiff's reply, defendant denies that Wisconsin would lose jurisdiction over any area over which it has ever had complete jurisdiction, and alleges that except as a no man's land may have existed at certain points along said boundary by reason of uncertainty as to the exact location thereof, under former definitions, the decree of this court (modified by striking out the word "by") defines the boundary as it has existed and been acquiesced in by both parties.

Michigan admits that at the time when the boundary was fixed by definition in its Enabling Act, sailing vessels instead of steamers were used in navigation and in this respect alleges that at said period "Mackinaw Boats" which could be either sailed or rowed were the form of ship most usual.

Michigan denies that the sailing ships had to back against the winds at times and alleges that it is impossible to propel a sailboat backwards against a wind.

Michigan admits that sailboats, desiring to reach an upwind destination, do so by a zigzag course, termed "tacking"; and denies that sailing vessels cannot pursue a course close to shore, and in this respect alleges that the captains of sailing vessels were accustomed to follow close to the eastern shores and the islands in Green Bay because of the existence of deep water close to such land and high bluffs on such lands, which made convenient landmarks, and were accustomed to shun the western shores of Green Bay because of the wide bench of shoal water and absence of land marks.

Michigan alleges that the sailing courses given on the Government charts represent the line to which ships shall adhere as closely as possible in traversing the several

passages. That such courses are determined in relation to the natural hazards of navigation and are the best evidence of the location of the center of the most usual ship channel. That a sailing vessel in tacking against a wind would lay a course to cross and recross such sailing course—the length of the leg on each tack depending on the direction of the wind and character of water on either side of such sailing course.

Michigan further alleges that by reason of the common use of such charts by fishermen and navigators, the location of such sailing courses is well known to them and the position of a vessel in relation to such sailing course is always apparent to her navigator and usually a matter of record in her log book.

Michigan further alleges that the line contended for by plaintiff, State of Wisconsin, is not the center of any channel, and could not be traversed by ships because of the existence of shoals, and because of uncertainty, would not be known to fishermen and navigators and would at all times be very difficult of determination.

Specifically—plaintiff's second point is indefinite and uncertain and cannot be easily determined because no method of marking same is possible and no course and distance from any recognizable monument is given and the distance from proposed monuments is so great that only a minute survey could determine said point with even a reasonable degree of accuracy.

Plaintiff's third point is an apparent invasion of Michigan water and is illogical as a point in the center of a ship channel, since being a dangerous shoal it is manifestly a part of the exterior boundary of such channel. It is true that such point may be determined when reached, but the determination would be hazardous, if not disastrous, to navigators and impossible when ice conditions prevail.

The fourth point is halfway between monuments so distant as to be usually invisible from one another and out of all lines of shipping.

The fifth point also is uncertain because Driscoll Shoal is invisible and the point is out of the channel.

The sixth point is untenable for the same reason as the third.

Defendant positively alleges that no ship could follow the line proposed by plaintiff except with extensive and unusual calculations, and only a vessel of very shallow draft could proceed over said courses and that the same is impractical as a State boundary.

PATRICK H. O'BRIEN,
Attorney General of Michigan,

MEREDITH P. SAWYER,
Special Counsel,

Attorneys for Defendant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

STATE OF WISCONSIN,	*Plaintiff,*	IN EQUITY.
vs.		
STATE OF MICHIGAN,	*Defendant.*	No. 12 Original.

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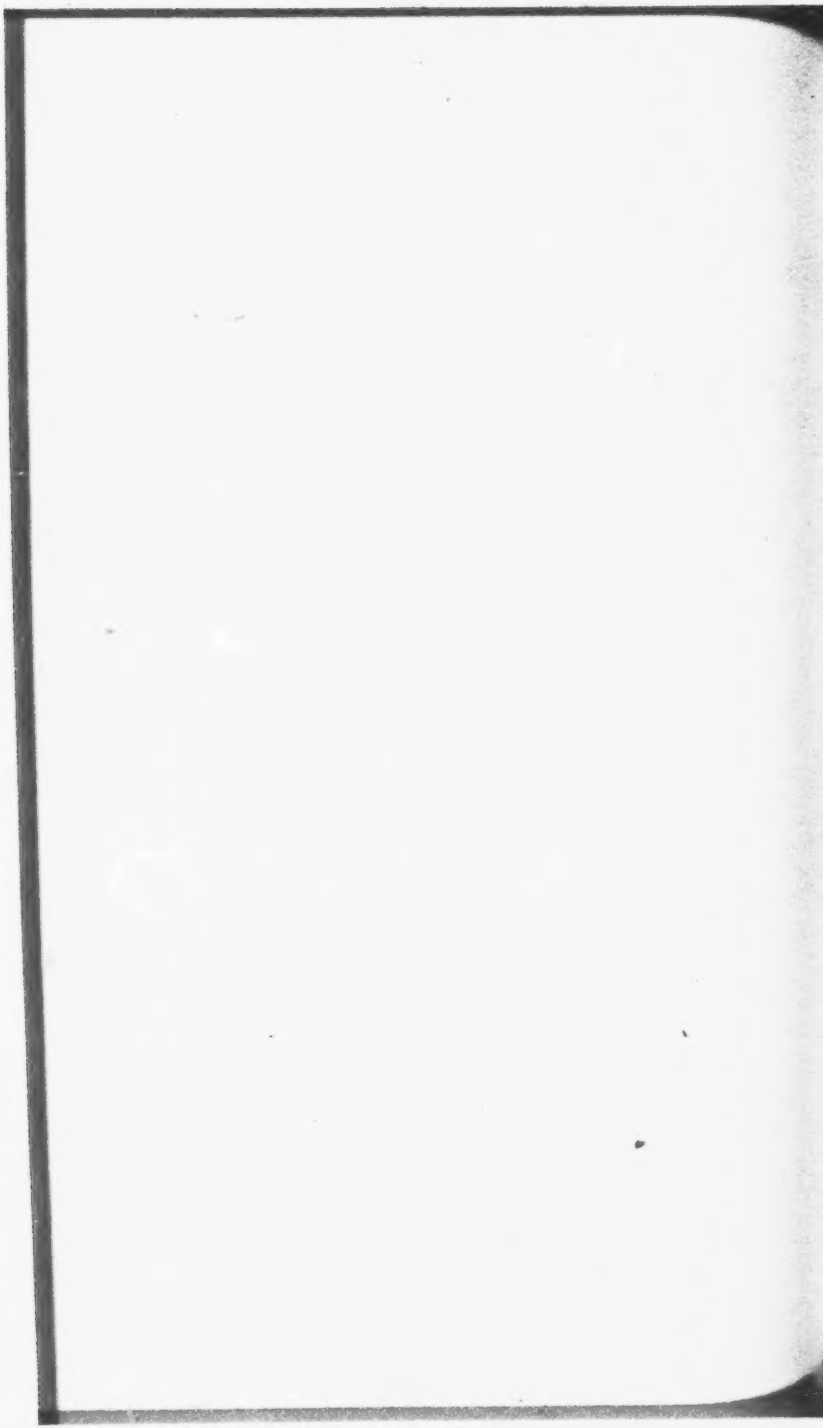


IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

STATE OF WISCONSIN, *Plaintiff,* vs. STATE OF MICHIGAN, *Defendant.*	IN EQUITY. No. 20 Original.

PRELIMINARY REPORT OF THE SPECIAL MASTER.

To the Supreme Court of the United States:

In the cause entitled State of Wisconsin v. State of Michigan, being Original No. 20, October Term, 1932, this Honorable Court appointed me as Special Master, by its order dated January 23, 1933, as follows:

> "It is further ordered that Frederick F. Faville, of Des Moines, Iowa, be and he is hereby, appointed master in this cause, with authority, upon the filing of the replication or a waiver thereof, to summon witnesses, issue subpoenas, and to take such evidence as may be introduced and such as he may deem it necessary to call for. The master is directed to make findings of fact and conclusions of law, and to submit the same to this Court with all convenient speed, together with his recommendations for a decree. The findings, conclusions and recommendations of the master shall be subject to consideration, revision or approval by the Court. The master shall be allowed his actual expenses and a reasonable compensation for his services to be fixed hereafter by the Court. The allowances to him, the compensation paid to his stenographic

and clerical assistants, and the cost of printing his report shall be charged against and be borne by the parties in such proportions as the Court hereafter may direct. If the appointment herein made of a master is not accepted, or if the place becomes vacant during the recess of the Court, the Chief Justice shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein."

The parties appeared before me as Special Master, by their respective counsel, at public hearings in Madison, Wisconsin, Menominee, Michigan, Lansing, Michigan, and Chicago, Illinois, at various times between February 21, 1933, and April 15, 1934, and have presented their evidence and have fully argued said cause orally and in writing.

Now, pursuant to the above-mentioned order, I have reported the testimony and the exhibits received by me as Special Master, by filing all of the same in the office of the Clerk of this Court, duly certified by me; and I herewith submit to the Court my findings of fact, conclusions of law, and recommendations as to a decree.

Respectfully submitted,

FREDERICK F. FAVILLE,
Special Master.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

STATE OF WISCONSIN, *Plaintiff,*		IN EQUITY.
vs.		No. 20 Original.
STATE OF MICHIGAN, *Defendant.*		

REPORT OF THE SPECIAL MASTER.

INTRODUCTORY.

This action is the aftermath of the case of Michigan v. Wisconsin in this court, and in which the opinion is reported in 270 U. S., 295. Said action involved the boundary line between the Upper Peninsula of Michigan and the State of Wisconsin.

Following the filing of the opinion in said case a decree was entered, which is reported in 272 U. S., 398. About five years later this action was commenced by the State of Wisconsin against the State of Michigan to correct the decree in said action as to a portion of said boundary line, and to determine and establish the true location of the same.

THE PLEADINGS.

The bill of complaint in this action was filed by the State of Wisconsin on November 7, 1932. In said bill it is alleged that in the year 1926, the defendant, State of Michigan, brought an original suit in this court, to determine the boundary between the states of Michigan and Wisconsin from the mouth of the Montreal river at Lake Superior to the ship channel entrance from Lake Michigan into Green Bay. It is alleged that, after full submission in this court, an opinion by Mr. Justice Sutherland was delivered March 1, 1926. I quote a portion of the opinion as set out in the bill:

> "This is an original suit in equity brought in this court to determine the boundary between the states of Michigan and Wisconsin from the mouth of the Montreal river at Lake Superior to the ship channel entrance from Lake Michigan into Green Bay. By the Enabling Act of June 15, 1836, chap. 99, 5 Stat. at L. 49, under which Michigan became a state in 1837 (January 26) chap. 6, 5 Stat. at L. 144, this boundary is described as follows:
>
> '* * * thence (the mouth of the Montreal river) through the middle of the main channel of the said River Montreal, to the middle of the Lake of the Desert; thence, in a direct line to the nearest headwater of the Menominee river; thence, through the middle of that fork of the said river first touched by the said line, to the main channel of the said Menominee river; thence, down the center of the main channel of the same, to the center of the most usual ship channel of the Green Bay of Lake Michigan; thence, through the center of the most usual ship channel of the said bay to the middle of Lake Michigan; * * *'
>
> The territory of Wisconsin was created by an act of April 20, 1836, chap. 545, 5 Stat. at L. 54, pp. 10, 11, and this boundary is there described in the reverse direction:
>
> '* * * to a point in the middle of said lake (Michigan), and opposite the main channel of Green Bay, and through said channel and Green Bay to the mouth of the Menominee river; thence, through the middle of the main channel of said river, to that head of said river nearest to the Lake of the Desert; thence in a direct line, to the

middle of said lake; thence through the middle of the main channel of the Montreal river, to its mouth; * * *'

The only difference between the two descriptions is that in the former the call is for the 'most usual ship channel,' while in the latter it is for the 'main channel', of Green Bay. In the Wisconsin Enabling Act of August 6, 1846, chap. 89, 9 Stat. at L., 56, 57, under which the state was admitted by the Act of May 29, 1848, chap. 50, 9 Stat. at L. 233, this boundary is described as '* * * running with the boundary line of the state of Michigan, through Lake Michigan, Green Bay, to the mouth of the Menominee river, thence up the channel of said river to the Brulé river; then up said last mentioned river to Lake Brulé; thence along the southern shore of Lake Brulé in a direct line to the center of the channel between Middle and South islands, in the Lake of the Desert; thence in a direct line to the headwaters of the Montreal river, as marked upon the survey made by Captain Cram; thence down the main channel of the Montreal river to the middle of Lake Superior; * * *'

That, to prevent all disputes in reference to the jurisdiction of islands in the said Brulé and Menominee rivers, the line be so run as to include within the jurisdiction of Michigan all the islands in the Brulé and Menominee rivers (to the extent in which said rivers are adopted as a boundary) down to, and inclusive, of the Quinnesec Falls of the Menominee; and from thence the line shall be so run as to include within the jurisdiction of Wisconsin all of the islands in the Menominee river, from the falls aforesaid down to the junction of said river with Green Bay: Provided, That the adjustment of boundary, as fixed in this act, between Wisconsin and Michigan shall not be binding on Congress, unless the same shall be ratified by the state of Michigan on or before the first day of June, one thousand eight hundred and forty-eight.'

The history of events leading up to the present controversy extends over a period of eighty years, and the evidence, including a multitude of official and other maps and documents, constitutes a long and involved record. The case is reviewed in voluminous but well prepared briefs, and was helpfully argued at the bar. This mass of material we have examined with the care properly due

the importance of the issue and the high character of the parties litigant; but much of it may be put aside as unnecessary for final consideration, since the determination we have reached depends upon a comparatively few decisive facts and circumstances, either undisputed or clearly established.

In the briefs and oral arguments the boundary is divided for purposes of convenient discussion into three distinct sections, namely (1) The Montreal river section, extending from the mouth of the Montreal river to the Lake of the Desert and thence to the headwaters of the Menominee river (to Lake Brulé); (2) the Menominee river section, extending from its headwaters (or from Lake Brulé) to Green Bay; and (3) the Green Bay section, extending from the last-named point through the center of the most usual ship channel of the Green Bay to Lake Michigan. Although our ultimate determination in respect of these three sections rests upon the same basic principle, they are so distinct in their physical characteristics and in respect of much of the evidence peculiarly applicable to each apart from the others, that our conclusions will be more clearly formulated and better understood if we adopt the same plan in the examination of the questions which follows.

The Montreal River Section."

(The part of the opinion referring to this section is omitted here as no controversy has been raised concerning it for the decree carries into effect this part of the opinion.)

"The Menominee River Section.

The description in the Michigan Enabling Act of this section of the boundary begins at the headwaters of the Menominee river nearest to the Lake of the Desert in a direct line, 'thence, through the middle of that fork of the said river first touched by the said line, to the main channel of the said Menominee river; thence, down the center of the main channel of the same, to the center of the most usual ship channel of the Green Bay.'

The description in the act creating the Territory of Wisconsin is the same, but in the opposite direction:

"* * * thence through the middle of the main channel of said (Menominee) river, to the head of said river nearest to the Lake of the Desert; thence in a direct line to the middle of said lake; * * *"

But the description in the Wisconsin Enabling Act contains important differences:

"* * * thence up the channel of said (Menominee) river to the Brulé river; thence up said last-mentioned river to Lake Brulé; thence along the southern shore of Lake Brulé in a direct line to the center of the channel between Middle and South islands, in the lake of the Desert; * * *"

Or, stated in the order of the Michigan act:

From the center of the channel between Middle and South islands in the Lake of the Desert in a direct line to the southern shore of Lake Brulé; thence along the southern shore of Lake Brulé to the Brulé river; thence down the Brulé river to the Menominee; thence down the channel of the Menominee to its mouth.

The evidence shows that Lake Brulé is not the head of the Menominee nearest to the Lake of the Desert, as called for by the Michigan Enabling Act, though the Brulé river is the principal tributary of the Menominee; and the inference is pretty clear that the change of description was made in the Wisconsin Enabling Act as a part of a general readjustment of the boundary. At any rate, since this part of the line is not in controversy, we need not consider the matter except as it may reflect light upon the effect of, and the question of Michigan's acquiescence in, the further provision, that, to prevent disputes as to jurisdiction, the line shall be so run as to include within the jurisdiction of Michigan all islands in the Brulé and Menominee down to and including the Quinnesec Falls of the Menominee, and thence so as to include within the jurisdiction of Wisconsin all islands in the Menominee below the falls. As to this part of the line, the contention of Wisconsin is that the description in the Wisconsin Enabling Act was in effect a proposed adjustment of the boundary as an undividable unit, and that Michigan, by the Constitution of 1850, having expressly adopted that part of the line from the Lake of the Desert

to Lake Brulé, cannot be heard to say that she did not also adopt the adjustment of the line in respect of the islands. There is force in this contention, and especially so in view of the fact that the change from the nearest headwater of the Menonimee to Lake Brulé operated to give Michigan additional territory. To permit her to reap the benefit of the adjustment so far as it is to her advantage and reject it to the extent that it is advantageous to her sister state would be plainly inequitable. We prefer, however, to rest our determination upon the conclusion, fully justified by the record, that—whatever were the rights of the respective states in respect of the islands in question immediately upon the adoption of the Constitution of 1850—Wisconsin, for a period of more than half a century following that time, had the undisputed and undisturbed possession of substantially all of the islands in the river below the Quinnesec Falls, and, without reference to the main channel of the river, exercised jurisdiction and dominion over them with the knowledge and acquiescence of the complainant.

Captain Cram's first report to Congress, dated December, 1840, points out the impracticability of following the center of the main channel of the river:

"The "center" of the main channel of the Menominee river is made a part of the boundary. The river contains numerous islands, and consequently more than one channel, where these islands occur. It will be impossible in many of these cases to know which is the "main channel" without minute surveys. In many cases it was tried and found impossible to decide by a simple inspection or reconnaisance which was the "main channel". It should also be remarked here that the term "main channel" applied to the multiplicity of channels of the Menominee, would be somewhat ambiguous in any event—for, it may be asked—Is the main channel the widest channel of the river? Or is it the deepest? If it is the widest or deepest now, will it be the widest or deepest hereafter? Or shall the main channel be that through which the greater quantity of water shall be found to pass at the time of the survey? And if it should occur that two channels at the same island pass equal quantities of water—which would then be regarded as the boundary? These questions are suffi-

cient to show the indefiniteness of the term "main channel"—There are also a few islands in the Brulé river to which similar questions might apply in reference to the term "main channel".

To avoid all ambiguity in reference to these channels, it might be specified in the act defining the boundary, that in ascending the stream, the boundary shall follow the extreme left hand channel of the Brulé and the extreme right hand channel of the Menominee down to a well known point of the river—say Pe-me-ne Falls; and thence to follow the extreme left hand channel of the remainder of the Menominee to its mouth. Such a division would leave most of the islands in Michigan and the remainder in Wisconsin, and would avoid much expense in minute surveys to ascertain the "main channel" and would leave no indefiniteness upon this part of the boundary. The free use of either channel for the purposes of navigation would, from an established principle of law be open at all times to the citizens of either state, and the islands would be nearly distributed in equal proportions between the two states.'

Following the date of this report in respect of the impossibility—or extreme difficulty, practically amounting to that—of locating the boundary in accordance with the provisions of the Michigan Enabling Act, and, it fairly may be assumed, with a view of effectuating Captain Cram's recommendation, the Michigan legislature passed the resolution already referred to, calling upon Congress to cause the boundary to be surveyed and marked in conformity with the manifest general intent of the Michigan Enabling Act, and requesting the delegation of the state in Congress to use their efforts to secure such action. This was followed, as already stated, by the introduction of the bills in the Senate and the subsequent insertion, by agreement between the members of Congress from Michigan and the Wisconsin delegate, of the provision in the Wisconsin Enabling Act dividing the islands in acocrdance with Captain Cram's suggestion, except in a particular not important here.

In 1854, the survey of all the islands below Quinnesec Falls as a part of Wisconsin was directed by the United States Surveyor General for Wisconsin, and such survey

was immediately begun and thereafter continuously prosecuted. The evidence, in our opinion, fairly shows that, as early as 1879, the greater part in area of all of them had been thus surveyed and platted as belonging to Wisconsin, including many which would fall on what Michigan claims is the Michigan side of the main channel. On behalf of Michigan, it is strongly contended that to this there are important exceptions. But, without going into details, it is enough to say that the clear weight of the evidence is to the contrary. It is true that so-called Island No. 8, or Merryman's Island, was surveyed as in both states; that the Wisconsin survey was subsequently cancelled; and that, thereafter, exclusive jurisdiction over the tract of land constituting it was exercised by Michigan. It is said that, nevertheless, the 'island' is now claimed by Wisconsin; but, on the contrary, Wisconsin concedes that it belongs to Michigan. The fact is that the tract was originally considered to be an island and, consequently, surveyed as a part of Wisconsin. Upon further investigation, it was found by the United States surveyor not to be an island, but, in reality, a part of the Michigan mainland. The Wisconsin survey was accordingly cancelled and the title of Michigan thereafter fully conceded. Two other so-called islands of small area in the same vicinity are in like situation.

Some of these islands, comparatively small in area and of little consequence, have never been surveyed or any definite acts of dominion exercise over them by either state. But to this we attach no importance. The assertion and exercise of dominion by Wisconsin over the islands on the Michigan side of the channel was begun and has continued in virtue of, and in reliance upon, the readjustment of the boundary set forth in the Wisconsin Enabling Act. The rule is well settled in respect of individual claimants that actual possession of a part of a tract by one who claims the larger tract, under color of title describing it, extends his possession to the entire tract in the absence of actual adverse possession of some part of it by another. *Clarke's Lessee* v. *Courtney*, 5 Pet., 319, 354; *Hunnicutt* v. *Peyton*, 102 U. S., 333, 368; *Ellicott* v. *Pearl*, 10 Pet., 412, 442; *Smith* v. *Gale*, 144 U. S., 509, 525, 526; *Montoya* v. *Gonzales*, 232 U. S., 375, 377;

Houston Oil Co. v. *Goodrich*, 213 Fed., 136, 142. Upon like grounds and with equal reason, under circumstances such as are here disclosed, the principle of the rule applies where states are the rival claimants. It results that the Wisconsin Enabling Act, together with the Act of Admission, gave color of title in that state to all of the islands within the limits there described; and that her original and continued possession, assertion and exercise of dominion and jurisdiction over a part of these islands, pursuant to such legislation and with the acquiescence of Michigan, extended Wisconsin's possession, dominion and jurisdiction to all of them, in the absence of actual possession of, or exercise of dominion over, any territory within the boundary by Michigan. The fact that the islands constitute separated tracts of land is of no consequence here, whatever its effect might be under other conditions. In applying the rule, the area within the described boundary, both land and water, must be considered as together constituting a single tract of territory.

We therefore hold, as to this section of the boundary, that from Lake Brulé to the mouth of the Menominee the line, which is now fixed and finally established by long acquiescence, follows the channels of the Brulé and Menominee wherever they are free from islands; that whenever islands are encountered above the Quinnesec Falls the line follows the channel nearest the Wisconsin mainland, so as to throw all such islands into Michigan; and that wherever islands are encountered below the Quinnesec Falls the line follows the channel nearest the Michigan mainland, so as to throw all such islands into Wisconsin.

The Green Bay Section.

In determining the boundary through this section, the question is not embarrassed by differences of description. The calls of the Michigan Enabling Act are down the channel of the Menominee to 'the center of the most usual ship channel of the Green Bay of Lake Michigan; thence through the center of the most usual ship channel of the said bay to the middle of Lake Michigan.' The Wisconsin Enabling Act calls for the same boundary.

The evidence shows that there are two distinct ship channels, to either of which this description might apply.

From the mouth of the Menominee, the channel, according to the Michigan claim, proceeds across the waters of Green Bay in an easterly direction until near the westerly shore of the Door county peninsula; thence, in close proximity to the shore, in a northerly direction to a point opposite Death's Door channel (or Porte des Morts); thence through that channel into Lake Michigan. The channel claimed by Wisconsin, after leaving the mouth of the Menominee, turns to the north and pursues a northerly direction to a point opposite the Rock Island passage which lies between Rock Island and St. Martin's Island; thence through the Rock Island passage into Lake Michigan. The territory in dispute lies between these rival channels, and embraces two groups of islands; (1) Chambers Island, the Strawberry Islands, and a few others, small and unnamed, all within the main waters of Green Bay west of the Door county peninsula; and (2) Rock, Washington, Detroit and Plum Islands, lying between Death's Door channel and the Rock Island passage, at the north end of the peninsula. The evidence as to which of the two ship channels was the usual one at the time of the adoption of the Michigan Enabling Act is not only conflicting, but of such inconclusive character that, standing alone, we could base no decree upon it with any feeling of certainty. Living witnesses are no longer available; and tradition, recollection of statements made by persons long since dead,—if of any legitimate value,—deductions drawn from ancient documents, more or less cryptic, and inferences based on more recent uses of the channels or on their relative safety and convenience as indicated by physical characteristics, all relied upon in the absence of first-hand evidence constitute at best most unsatisfactory substitutes. If it were necessary, we should, of course, undertake the task—as we should be bound to do—of reaching a conclusion from these dubious premises. But it is not necessary, for, as in the case of the two sections of the boundary just discussed, the title of Wisconsin to the disputed area now in question is established by long possession and acquiescence; and this conclusion is justified by evidence and concessions of the most substantial character.

There is evidence of acts of dominion and possession of some of the disputed islands while Wisconsin was yet a

territory. Almost from the day of her admission, the state has continuously possessed, asserted title and exercised jurisdiction and dominion over all of the islands within the boundary claimed by her. In support of this general statement, the following, among other things, may be cited: On March 21, 1855, Washington, Detroit, Rock and Plum islands, described as being in the waters of Green Bay in Door county, were organized by an act of the Wisconsin legislature as the town of Washington, Wis. Laws 1855, chap. 210. A census taken the same year by the town clerk showed a population of 318, which has since grown, it is said, to about 1,000. Since before that time, the United States Land Department, by its surveys, plats, and sales of public lands, has uniformly and notoriously recognized the islands as a part of Wisconsin, without objection on the part of Michigan. Indeed, as early as 1837, they were surveyed and platted as a part of Wisconsin territory. A large number of maps published and available to the public during the years between 1837 and 1878, without exception, show the islands as a part of Wisconsin; and during the same time they do not appear in any survey or upon any map as belonging to Michigan. Never, so far as we are able to find from the record, have they been recognized in any practical way as a part of Michigan or, prior to the commencement of this suit, claimed by that state.

The evidence in respect to the other group of islands, while perhaps not so complete, is definite and clear to the same effect. The taxation of lands on Chambers Island began while Wisconsin was still a territory. In 1861, voters on that island participated in a Wisconsin election. A history of Door county, introduced by complainant, recites that the island constituted an organized town forming a part of Door County, Wisconsin, as early as 1867. Evidence of early and continued recognition and treatment of the island as part of Wisconsin by the United States through its surveys, etc., is to the same effect as that in respect of the other group. And the evidence is likewise the same in respect of the uniform appearance of Chambers Island and the other small islands of the group upon the old maps as a part of Wisconsin, and their absence from Michigan surveys and maps. The absence

of evidence of specific acts of dominion over the Strawberry and the other small islands of this group is easily understood and does not affect the result. They are of little consequence, lying well within the boundary as claimed by Wisconsin, easterly from Chambers Island and near the westerly shore of the Door county peninsula. They appear on all maps as, and have never been regarded or treated otherwise than, a part of Door county. It is impossible to give them a status differing from that of the larger island and the peninsula, between and within the shadows of which they lie.

That Wisconsin since statehood has continuously asserted title and has exercised complete and exclusive dominion over all the islands of both groups is really not a serious issue. Indeed, the bill of complaint avers that Wisconsin had possessed herself of, and exercised sovereignty over, the islands, including Washington, Plum, the Strawberries, and numerous other valuable islands, and has excluded and continues to exclude the state of Michigan from her rights thereto; and, more particularly, that 'Wisconsin has for many years disregarded the true and rightful boundary * * * and has for a long time past possessed and does now possess, and has asserted and does now assert, civil, criminal and political jurisdiction over those portions of the territory within the Michigan boundaries above described as the Montreal river section, the Menominee river section, and Green Bay sections of the disputed territory, aggregating approximately 255,000 acres, * * * and has unlawfully taxed and still continues to unlawfully tax said property, * * *.' The explanation relied upon is that the state of Michigan, as a result of her excusable ignorance, has not been aware of the real facts and, therefore, should not be held to have lost rights by long acquiescence which she otherwise might have had. This view cannot be accepted and may be dismissed with a reference to what we have already said as to the same defense in respect to the Montreal river section.

In respect of the controversy as a whole, and each of the three sections, the words of this court in *Indiana v. Kentucky*, 136 U. S., 509, are singularly apposite and conclusive:

'It was over seventy years after Indiana became a state before this suit was commenced, and during all this period she never asserted any claim by legal proceedings to the tract in question. She states in her bill that all the time since her admission Kentucky has claimed the Green River island to be within her limits and has asserted and exercised jurisdiction over it, and thus excluded Indiana therefrom, in defiance of her authority and contrary to her rights. Why then did she delay to assert by proper proceedings her claim to the premises? On the day she became a state her right to Green River island, if she ever had any, was as perfect and complete as it ever could be. On that day, according to the allegations of her bill of complaint, Kentucky was claiming and exercising, and has done so ever since, the rights of sovereignty both as to soil and jurisdiction over the land. On that day, and for many years afterwards, as justly and forcibly observed by counsel, there were perhaps scores of living witnesses whose testimony would have settled, to the exclusion of a reasonable doubt, the pivotal fact upon which the rights of the two states now hinge, and yet she waited for over seventy years before asserting any claim whatever to the island, and during all those years she never exercised or attempted to exercise a single right of sovereignty or ownership over its soil. It is not shown, as he adds, that an officer of hers executed any process, civil or criminal, within it, or that a citizen residing upon it was a voter at her polls, or a juror in her courts, or that a deed to any of its lands is to be found on her records, or that any taxes were collected from residents upon it for her revenues.

The long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the state of Kentucky, such omission to take any steps to assert her present claim by the state of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion

and sovereignty over it, is conclusive of the nation's title and rightful authority.'

The result is that complainant has failed to maintain her case in any particular; and that the claims of Wisconsin as to the location of the boundary in each of the three sections are sustained.

The decree, therefore, will be for Wisconsin, costs to be divided between the parties in accordance with the general rule in cases of this character. *North Dakota* v. *Minnesota*, 263 U. S., 583. The boundary seems to be sufficiently defined for all purposes of future possession and jurisdiction; but the parties, or either of them, if so advised, may within thirty days submit the form of a decree more particularly to carry this opinion into effect; failing which, a simple decree dismissing the bill will be entered.

It is so ordered."

The bill of complaint alleges that, following the announcement of said opinion, a form of decree was submitted by special counsel for the state of Wisconsin, which is attached as an exhibit to the bill of complaint and is as follows:

"This cause having been heard and submitted upon certain questions, and the court having considered the same and announced its conclusions in an opinion delivered March 1, 1926 (270 U. S., 295),

It is ordered, adjudged and decreed:

1. That the boundary between the States of Michigan and Wisconsin along the following course be and it is hereby fixed and finally established as follows:

Beginning at the boundary line between the State of Michigan and the State of Wisconsin in the middle of Lake Michigan and opposite the most usual ship channel leading into Green Bay from said lake, thence in a direct line to the middle of the most usual ship channel into Green Bay, thence along the midde of said channel which is north of Rock Island and north and west of Chambers Island, to the main channel of the Menominee River, thence along the main channel of said Menominee River and the Brulé River, wherever the said rivers are free of islands, to Lake Brulé, provided, that wherever islands are encountered in either of said rivers the boundary line

follows along the channel nearest the Michigan mainland so as to throw all such islands between the mouth of said Menominee River and the Quinnesec Falls extending between Section 6, Township 38 North of Range 20 West of the Wisconsin survey, and Section 8, Township 39 North of Range 30 West of the Michigan survey, in said river into Wisconsin, and wherever islands are encountered in said rivers between said Quinnesec Falls and Lake Brulé, the boundary follows the channel nearest the Wisconsin mainland so as to throw all such islands into Michigan, thence along the southern shore of Lake Brulé in a direct line to the center of the channel between the Middle and South Islands in the Lake of the Desert, thence in a direct line to the headwaters of the Montreal River, as marked upon the survey made by Captain Cram, said line between Lake Brulé and the headwaters of said Montreal River to follow the line surveyed, marked, established and identified by William A. Burt in 1847, thence down the main channel of the Montreal River, being sometimes known as the East Branch of the Montreal River to the mouth thereof. * * *"

The bill alleges that to this proposed form of decree the state of Michigan filed objections as follows:

"The above named plaintiff now comes and objects to the form and substance of the decree proposed by the defendant in said cause for the reasons that the provisions of said decree are contrary to the manifest intentions of this court as expressed in its opinion and are against the rights of the plaintiff.

First Objection.

That the description in said decree is in the reverse order from that given in the opinion and in the statutory enactments and that as a result thereof plaintiff would be deprived of jurisdiction over an area of considerable extent in the waters of Green Bay and in that section of the Menominee River known as the Quinnesec Falls, and that the description of the boundary through Green Bay is too indefinite and uncertain and should be by courses and distances as shown upon the Government charts in evidence in the case.

Second Objection.

That the said proposed decree does not in any way define what are to be considered islands in the Menominee River and that by the language of said decree the rights of plaintiff to the lands now held by it known as Merryman's Island and Sugar Island are jeopardized."

It is further alleged that later the state of Michigan filed its motion to amend the proposed decree as follows:

"Comes now the said plaintiff and moves the court to amend the proposed decree heretofore filed by defendant by striking out that portion of said decree describing the boundary between the plaintiff and defendant states and insert in lieu thereof the following:

'From Lake Superior through the middle of the main channel of the Montreal River, to the headwaters thereof, as established in the survey of Captain Cram at the Junction of Pine River and Lehman's Creek, thence along the line of the survey of William A. Burt, of 1847, to the center of the channel between Middle and South Islands in Lake Vieux Desert, thence continuing along the line of said survey to the shore of Lake Brulé, thence along the southerly shore of Lake Brulé, to the center of the main channel of the River Brulé, thence down the center of the main channel of the Rivers Brulé and Menominee, to the center of the harbor entrance of said Menominee River, thence, east by south, seven and one-half miles, to the center of the most usual ship channel of the Green Bay, thence along said channel, north by east, one-eighth east, eight and seven-eighths miles, thence continuing along said ship channel north by east, seven-eighths east, twenty-seven miles, thence continuing along said ship channel, east one-fourth north, ten and one-fourth miles, thence east three-fourths north, to the boundary between the States of Michigan and the State of Wisconsin, in Lake Michigan. Provided, that, that section of the boundary in the Brulé and Menominee Rivers, shall follow the main channel thereof, except that where islands occur in the Brulé River, and in the Menominee River, down to, and inclusive of the Quinnesec Falls, the line shall pass through the channel nearest the Wisconsin bank, so as to throw all such islands into Michigan, and where islands

occur in the Menominee River below Quinnesec Falls, the line shall pass through the channel nearest the Michigan bank, so as to throw all such islands into Wisconsin. Provided, further, that no land now occupied or taxed as a part of the State of Michigan, shall be considered as an island under the provision of the last clause hereof."

The bill alleges that a number of conferences were held between the attorneys for the parties, and that the attorneys for Michigan submitted a proposed draft of the boundary in Green Bay; that the description is highly technical; that both parties accepted the description, which was furnished by the city engineer of Menominee to counsel, believing it to carry into effect the decision of the court. The bill alleges that the decree as so drawn by counsel was submitted to the court and duly promulgated, and is reported in 272 U. S., 398, and the portion pertinent to this case is as follows:

"Decree announced by Mr. Justice Sutherland:

This cause having been heard and submitted upon certain questions, and the court having considered the same and announced its conclusions in an opinion delivered March 1, 1926 (270 U. S., 295, 70 L. ed., 595, 46 Sup. Ct. Rep., 290).

Now for the purpose of carrying the said opinion into effect, it is ordered, adjudged and decreed:

1. That the boundary between the states of Michigan and Wisconsin along the following course be and it is hereby fixed and finally established as follows: * * * thence down the center of the main channel of the Rivers Brulé and Menominee, to the center of the harbor entrance of said Menominee river, thence in a direct line to the most usual ship channel of Green Bay, passing to the north of Green Island and westerly of Chambers Island and through the Rock Island passage into Lake Michigan, by courses and distances as follows: From a point midway between the outer ends of the Menominee river piers, thence east by south, 7½ miles to the center of the most usual ship channel of the Green Bay, thence along said ship channel north by east one-eight east, 8⅞ miles, thence continuing along said ship channel north by east

seven-eighths east, 27 miles thence continuing along said ship channel, east one-fourth north, 10¼ miles, thence east three-fourths north to the boundary between the state of Michigan and the state of Wisconsin in the middle of Lake Michigan. * * * and the land known as 'Sugar island,' being a part of lots 1 and 2, section 11, lot 6 of section 2, and lot 1 of section 3, township 31 north, of range 27 west, of the Michigan Public Survey, is determined to be a part of the mainland of Michigan."

The complainant alleges that the said decree does not carry into effect the decision of the court, in that the line describing the boundary, after leaving the mouth of the Menominee river does not turn to the north and does not pursue a northerly direction to a point opposite the Rock Island passage and through said passage into Lake Michigan, but that said boundary line, after leaving the mouth of the Menominee river, runs east by south seven and one-half miles, fully one-half the distance across Green Bay, and then turns along a line north by east one-eighth east eight and seven-eighths miles, and then follows a line far to the north and east of the line described in the decision.

Complainant further alleges that the land known as Sugar Island, which was determined by the decree to be a part of the mainland of Michigan, was incorrectly described in the decree and that the description covers part of so-called Grassy Island.

Complainant alleges that said errors in the decree were the result of mutual mistakes.

Complainant alleges that by said erroneous decree it loses about thirty-five square miles of fishing area which has always been under the jurisdiction of Wisconsin and over which Michigan has never exercised any jurisdiction. Complainant prays that the alleged erroneous portion of the decree may be stricken; that a true description as claimed by complainant be inserted; and for general equitable relief.

To the bill of complaint the defendant filed answer on December 27, 1932, in which the defendant admits the allega-

tions of the bill respecting the submission of a form of decree and objections thereto, and alleges that the decree is correct except for a typographical error respecting the boundary in Green Bay, in that the third course is described as north *by* east seven-eighths east, whereas it should be northeast seven-eighths east; and defendant admits also that there was an error in the technical legal description of Sugar Island as embodied in the decree. Defendant avers that in the trial of the former case the effort of both parties was directed to the determination of the most usual ship channel in Green Bay with relation to the islands in said bay, and that the location of the line from the harbor entrance of the Menominee river to the ship channel was under discussion, and that the description as contained in the decree was agreed upon. Defendant alleges that it has had actual jurisdiction over the triangle of water in dispute for many years, and denies that said area was ever under the jurisdiction of Wisconsin. Defendant prays that the decree may be modified and corrected as to the conceded errors, and that otherwise relief be denied to complainant, and that complainant be denied any affirmative relief by reason of the fact that the matters and things set forth in the bill of complaint are *res adjudicata*.

Complainant filed a reply to defendant's answer, and therein alleges that the main contention in the original suit was to ascertain whether the main channel of Green Bay was the so-called "Strawberry channel" or the channel between Chambers island and the Michigan mainland; and denies the affirmative allegations of defendant's answer.

Defendant filed an answer to the affirmative allegations of complainant's reply, denying the same.

Under these issues it is first necessary to determine whether or not complainant can maintain this suit.

AS TO COMPLAINANT'S RIGHT TO MAINTAIN THIS ACTION.

Findings of Fact.

The basis of complainant's contention of a right to maintain this action is: (1) that mutual mistakes were made in the description of the boundary line in the decree in the former case; (2) that said decree was entered by consent and was erroneous; and (3) that the issue now tendered as to the true location of the boundary line in the *waters* of Green Bay either under a claim of possession or under the Congressional Acts was not adjudicated in the original case.

(1) As to Mutual Mistakes in Former Decree.

I find that after the opinion of the court had been promulgated in the former case, counsel for the respective parties met in the city of Washington and had a conference with Mr. Justice Sutherland, the author of the opinion, and were directed by him to formulate a decree in harmony with said opinion. This counsel undertook to do.

It was obvious that the line must be drawn west of Chambers Island in order to give said island to Wisconsin, to which state the court found said island belonged by dominion and possession. In drafting the decree as to the boundary line in Green Bay, a line was drawn easterly from the mouth of the Menominee river seven and one-half miles, perpendicular to a sailing course as shown on a modern sailing chart, and the attempt was made to follow said sailing course as charted, west of Chambers Island and through the Rock Island passage into Lake Michigan. I find that the description in the decree as to this portion of the boundary line was furnished at the conference in good faith by counsel for Michigan, who was familiar with local conditions and nautical terms, as conforming to the opinion of the court, and was accepted by counsel for Wisconsin, who was not familiar with nautical terms or local conditions, as so complying, and that said decree was approved by

the court because consented to by counsel for both parties as being in accord with the opinion of the court.

The accompanying map will assist in an understanding of the question here presented. It is a copy of an exhibit in the case. On this map three lines appear, which are colored, respectively, black, blue and red. The black line, A. H. O. K. J. X., is substantially the boundary line of the decree in the former case. The red line, A. H. O. Q. S. R., is the line now claimed by Michigan. The blue line, A. B. C. D. E. F. G., is the boundary line now contended for by Wisconsin. It will be observed that there is a triangle formed by the lines A. H., A. O., and H. O., which is the important water area involved in this law suit. This area is opposite the city of Menominee in Michigan, and the city of Marinette in Wisconsin, which cities are on opposite sides of the Menominee river at its mouth. This is a very important and valuable area for commercial fishing. It is apparent that it is important to the fishing industry to determine definitely to which state this area belongs, as questions of licenses to fish therein, patrolling, and other matters, are involved. The line A. M. N. P. on the map is substantially the line contended for by Michigan in the former suit. In a general way, this line indicates the "Strawberry island passage." The island to the east of the letter O on the map, at the tip of the triangle, is Chambers Island, which the court gave to Wisconsin. It is now conceded by both parties that the boundary line must pass to the west of Chambers Island, under the decision in the former case.

Upon its own theory regarding the location of the boundary line, Michigan concedes that there are at least two errors in the description contained in the decree. As before stated, the description embodied in the decree was substantially a line east from the mouth of the Menominee river, seven and one-half miles perpendicular to the sailing course shown on modern charts passing west of Chambers Island, and, as drawn in the decree, it was supposed to follow said sailing course through the Rock Island passage into Lake Michigan.

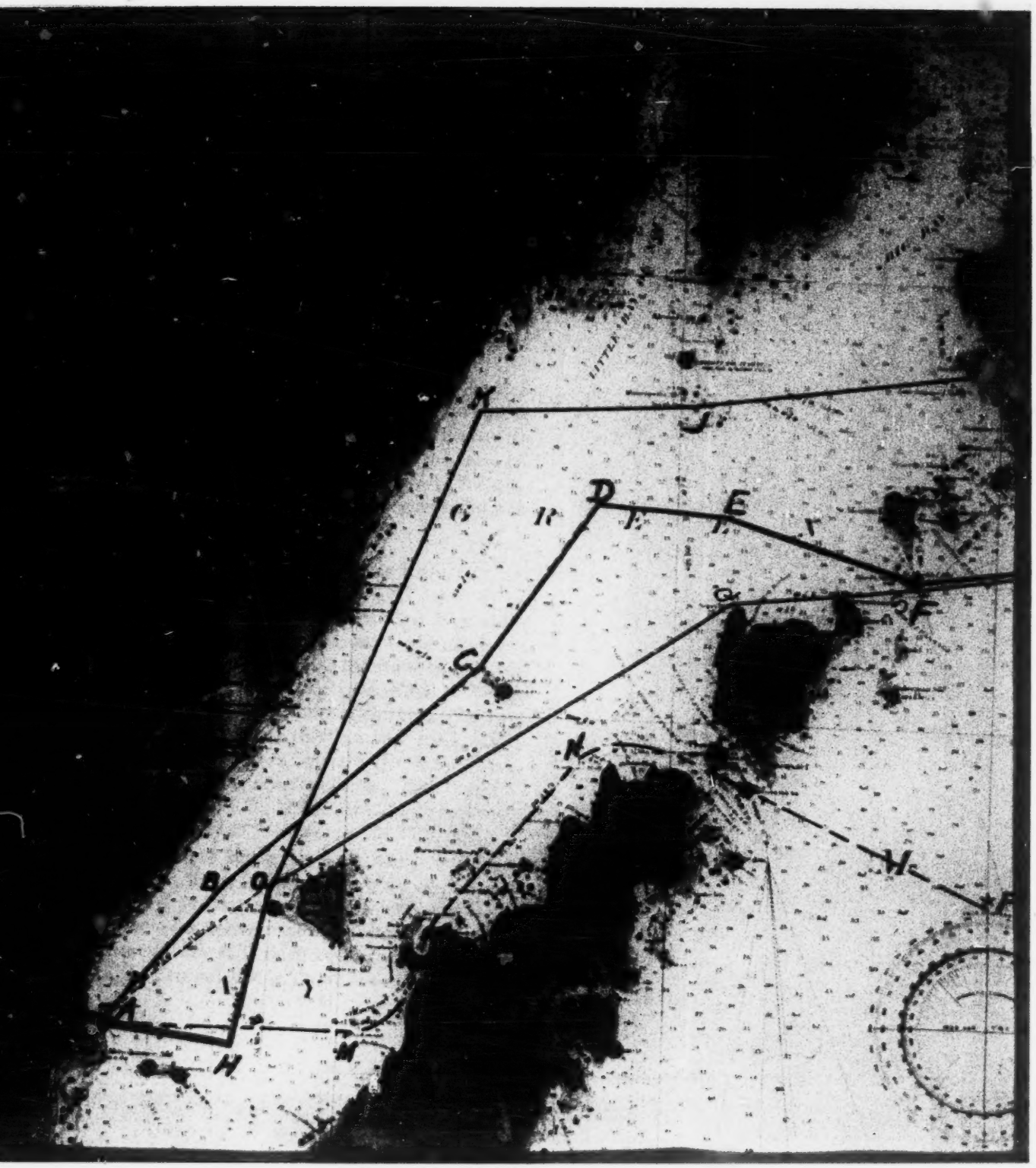
The description in the decree is as follows:

"* * * to the center of the harbor entrance of ... Menominee river, thence in a direct line to the most ... ship channel of Green Bay, passing to the north of G... Island and westerly of Chambers Island and through ... Rock Island passage into Lake Michigan, by courses ... distances as follows: From a point midway between ... outer ends of the Menominee river piers, thence eas... south, 7½ miles to the center of the most usual ship c... nel of the Green Bay, thence along said ship channel ... by east one-eighth east, 8⅞ miles, thence continuing ... said ship channel north by east seven-eighths east, ... miles, thence continuing along said ship channel, ... one-fourth north, 10¼ miles, thence east three-fou... north to the boundary between the state of Michigan ... the state of Wisconsin in the middle of Lake Michig...

Michigan now concedes that the distance from the ce... of the harbor entrance of the Menominee river in a perp... dicular line to the center of said sailing course is seven ... one-eighth miles instead of seven and one-half miles as st... in the decree.

In the decree the third course of the boundary is descri... as follows: "* * * thence continuing along said ship cha... north *by* east seven-eighths east 27 miles * * *." The ... discloses the effect of the insertion of the word "by" in t... description of this course. As written in the decree, the ... would follow substantially the black line A. H. O. K. J. I. ... the map. This would be in conflict with the opinion of t... court under any possible construction, and would give isl... that belong to Michigan, and even a part of the Michi... mainland, to Wisconsin. There can be no question but ... this discription is erroneous, and that the word "by" abo... in any event, be eliminated from the decree.

The conclusion is inevitable that mutual mistakes w... made in the decree and that it is absolutely essential that ... decree be opened up and the necessary corrections be m... to carry out the purpose and intent of the court as expre... in the opinion.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(2) As to Consent to Former Decree.

I find that not only does the decree in the former case contain mutual mistakes, but also that it was entered by consent of the parties under the mistaken belief that it complied with the opinion of the court. There is no conflict in the record on this question. Counsel for the parties consented to the decree in the form in which it was drawn, and the court adopted it because of such consent of counsel.

(3) As to the Issue of the True Location of the Line in Green Bay now Presented.

I find that the issue now tendered as to the true location of the boundary line, in the *waters* of Green Bay as distinguished from the islands therein, was not directly involved in the former suit; that no evidence was offered in that case on the question of jurisdiction over said waters except incidentally, and that the court made no definite pronouncement in relation thereto in its opinion.

Conclusions of Law as to Complainant's Right to Maintain this Action.

(1) Finding, as I do, that mutual mistakes were made in drafting the decree in the former case, I conclude as a matter of law that the complainant has the right to have the same corrected in this court and in this proceeding. It is one of the well-recognized powers of a court of equity to grant relief against a judgment or decree that has been rendered by mistake. In this case the suit is between the same parties and in the same court and the attack is direct. See, *Brown* v. *County of Buena Vista*, 95 U. S., 157; *Rhode Island* v. *Massachusetts*, 15 Pet., 233; *Metcalf* v. *Williams*, 104 U. S., 93.

(2) Also, the decree being a consent decree and being erroneous, as I find it to be, it may properly be corrected in this action. Counsel for defendant frankly concedes in his brief that "an erroneous decree resulting from consent of the parties is not *res adjudicata*." Such is the law. As bearing on the question, see *Lawrence Mfg. Co.* v. *Janesville Mills*, 138

U. S., 552; *Gay* v. *Parport*, 106 U. S., 679; *Utah Power & Light Co.* v. *United States*, 42 Fed. (2d), 304, 308.

(3) I also conclude as a matter of law that, inasmuch as the issue of dominion over the *water* area in Green Bay, as distinguished from the *islands* therein, was not directly in issue in the former suit, that as no evidence was offered in the former case upon that question and no definite pronouncement made by the court, complainant is not barred from prosecuting this action to have the true location of the portion of said boundary involved in this case now determined. *Hopkins* v. *Lee*, 8 Wheat., 109; *Iowa* v. *Illinois*, 151 U. S., 238; *Oklahoma* v. *Texas*, 256 U. S., 70; *Virginia* v. *Tennessee*, 148 U. S., 503; *Indiana* v. *Kentucky*, 136 U. S., 479; *Missouri* v. *Kentucky*, 11 Wall., 395; *Rhode Island* v. *Massachusetts*, 4 How., 591; *Louisiana* v. *Mississippi*, 202 U. S., 1.

Reaching the conclusion that complainant may now prosecute this action, I proceed to report upon my findings of fact, conclusions of law, and recommendations on the main questions involved in the case at bar. On final analysis, four questions are presented: (1) Has a definite boundary line in said waters of Green Bay been established by *dominion and acquiescence* therein; and (2) if a boundary line has not been so established, then where is said boundary line to be located under the terms of the Acts of Congress; (3) which state is entitled to Grassy Island and (4) which state is entitled to Sugar Island?

AS TO THE LOCATION OF THE BOUNDARY LINE BY DOMINION AND ACQUIESCENCE.

Findings of Fact.

Both complainant and defendant claim the right to the disputed area by possession and acquiescence. A very large amount of evidence was introduced on this branch of the case. Some eighty or more witnesses were examined, quite evenly divided between the two parties as to numbers. A majority

of the witnesses were fishermen. In a general way, the Wisconsin fishermen contended that the disputed area had been long occupied by fishermen from that state; the Michigan fishermen contended that they and their colleagues have had possession of the area for a long time. Much evidence was offered as to the location of a "generally accepted and reputed boundary line" in the waters of Green Bay. Of necessity, the evidence as to the location of such a line in the open waters of a bay approximately seventy miles long and twenty miles wide was very uncertain and indefinite. In the opinion in the former case this court aptly said:

> "Living witnesses are no longer available; and tradition, recollection of statements made by persons long since dead,—if of any legitimate value,—deductions drawn from ancient documents, more or less cryptic, and inferences based on more recent uses of the channels or on their relative safety and convenience as indicated by physical characteristics, all relied upon in the absence of first-hand evidence, constitute at best most unsatisfactory substitutes."

The same is true of the evidence in the instant case. Obviously, fishermen were not overly zealous to be exact and punctilious in keeping their nets upon the proper side of an unmarked and imaginary boundary line in the wide and open waters of Green Bay. Their testimony as to where tradition had placed the boundary line in such waters is, of necessity, unsatisfactory in establishing a definite and certain line. I find that both Wisconsin and Michigan fishermen plied their occupations in the triangular disputed area, and, quite generally, in the waters of Green Bay. I can not find in the record such long-continued and exclusive possession of the disputed area, by either state or its citizens, as would constitute the exercise of dominion over the area by one state to the exclusion of the citizens of the other state and acquiescence in such possession. The situation is very different from the one respecting the *islands* of Green Bay that were involved in the

former suit, where, by act of the legislature of Wisconsin, certain islands had been organized into a municipality and the state of Wisconsin had exercised sovereignty over them for many years. In the instant case there is some slight evidence of the patrolling of a portion of Green Bay by Michigan game wardens, but no such exclusive, open, and hostile exercise of dominion over the disputed area as would establish title. I do not deem it essential to incorporate in this report an extensive review of the testimony of the eighty or more witnesses as to where they fished, or with what traditions they were familiar as to the location of the reputed boundary line in the waters of Green Bay. I heard the evidence in open court, and spent a considerable amount of time inspecting the *locus in quo*, accompanied by counsel for both parties. I have since read the transcript of the evidence with care, and I think that but one conclusion can be reached on this branch of the case, and that is, that neither state has exercised such exclusive dominion over the waters now in dispute, and particularly over the triangular area in question, as to establish any certain or definite line as a boundary by possession and acquiescence. In a general way, the Michigan fishermen fished in the waters adjacent to the Michigan mainland, and the Wisconsin fishermen carried on their occupation in the waters near the Wisconsin mainland and the islands in that vicinity; but I find no sufficient evidence of any well-defined or recognized boundary line in the open waters of Green Bay, west and south of Chambers Island and particularly in the triangular area, that it could be said is established by dominion and acquiescence. I find that the state of Wisconsin required residents of that state to procure licenses to fish in its waters in 1907, and required licenses of nonresidents in 1909; and the state of Michigan required licenses of both residents and nonresidents in 1907. I find that many of the fishermen from both states secured licenses from each of said states, which, of itself, is some indication of uncertainty on their part as to the location of the boundary line.

Many exhibits were offered in evidence, including maps, both ancient and modern, official and unofficial. Expert evidence was offered respecting the true interpretation of the maps, and other matters. There was evidence of an action involving the replevin of nets that had been seized by a warden, and in which case the location of the nets as to the boundary line was involved. Under the record, I do not find the decision in the case referred to, at all determinative of the question involved herein.

Great diligence has been exercised by counsel for both parties in bringing into the record all evidence available on the question before the court. To attempt an analysis and review of the large record in the case would unduly extend this report. I find that the record fails to disclose that any certain, definite, and ascertainable boundary line has been established in the waters in controversy by the exercise of exclusive dominion over the same by either of said states.

Conclusions of Law on Question of Dominion and Acquiescence.

In the opinion in the former case this court said:

"That rights of the character here claimed may be acquired on the one hand and lost on the other by open, long-continued, and uninterrupted possession of territory, is a doctrine not confined to individuals, but applicable to sovereign nations as well, *Direct United States Cable Co.* v. *Anglo-American Teleg. Co.*, (1877) L. R. 2 App. Cas., 394, 421; Wheaton, Int. Law, 5th Eng. ed., 268, 269; 1 Moore, Int. Law Dig., 294 *et seq.*, and, *a fortiori* to the quasi sovereign states of the Union. The rule, long settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority. *Indiana* v. *Kentucky*, 136 U. S., 479, 509 *et seq.*, 34 L. ed., 329, 332, 10 Sup. Ct. Rep., 1051; *Virginia* v. *Tennessee*, 148 U. S., 503, 522-524, 37 L. ed., 537, 544, 545, 13 Sup. Ct. Rep., 728; *Louisiana* v. *Mississippi*, 202 U. S., 1, 53, 50 L. ed.,

913, 932, 26 Sup. Ct. Rep., 408, 571; *Maryland* v. *West Virginia*, 217 U. S., 1, 40-44, 54 L. ed., 645, 657-659, 30 Sup. Ct. Rep., 268; *Rhode Island* v. *Massachusetts*, 4 How., 591, 639, 11 L. ed., 1116, 1137; *Missouri* v. *Iowa*, 7 How., 660, 677, 12 L. ed., 861, 868; *New Mexico* v. *Colorado*, 287 U. S., 30, 40, 41, 69 L. ed., 499, 502, 503, 45 Sup. Ct. Rep., 202. That rule is applicable here and is decisive of the question in respect of the Montreal river section of the boundary in favor of Wisconsin."

The converse of this rule is also the law.

I conclude that neither state has shown such an open, long-continued, uninterrupted, and peaceable possession of the disputed area and the exercise of sovereignty and dominion over it as to establish any definite line as the true boundary line in Green Bay.

AS TO THE LOCATION OF THE BOUNDARY LINE UNDER THE ACTS OF CONGRESS.

Findings of Fact.

The territory of Wisconsin was created by an Act of Congress of April 20, 1836 (chap. 54, 5 Stat. at L., 10, 11). The boundary of Wisconsin, as fixed by said Act, in so far as involved in this suit, provides: "* * * to a point in the middle of said lake (Michigan) and opposite the main channel of Green Bay and through said channel and Green Bay to the mouth of the Menominee river." By the Enabling Act of June 15, 1836 (chap. 99, 5 Stat. at L., 49), under which Michigan became a state on January 26, 1837 (chap. 6, 5 Stat. at L., 144), the boundary in Green Bay was in the reverse direction from the description in the Wisconsin Territorial Act, and was as follows: "* * * thence down the center of the main channel of the same (Menominee river) to the center of the most usual ship channel of the Green Bay of Lake Michigan; thence through the center of the most usual ship channel of the said bay to the middle of Lake Michigan."

Both parties assume that these two descriptions must, of necessity, be construed to be identical. Also both parties assume that the descriptions refer to a channel in the main body of Green Bay. Construing the two Enabling Acts together, the difficult question arises as to the true location of the boundary line under the descriptions in said acts. No evidence of living witnesses is available as to where "the center of the most usual ship channel" or the "main channel" of Green Bay was in 1836. I find that there was no such thing as a charted sailing course, or any well-recognized or defined ship channel in the waters of Green Bay in 1836. The ships of that day that traversed Green Bay were almost entirely sailing vessels of light draft, and, except for avoiding islands, shoals, and reefs, they traversed the waters of Green Bay in the most direct and convenient way in which to reach their destinations, without being limited to any defined channel.

Many ancient maps were introduced in evidence. They were interpreted by a map expert. They were not drawn to scale; they were mostly what might properly be termed "sketch maps" of explorers or engineers. Some are apparently inaccurate as to the location of islands and channels. Slight, if any, dependence can be placed upon them as showing any "most usual ship channel" extending lengthwise in Green Bay in or about 1836.

In 1840 one Captain Cram was sent by the War Department to make a survey of the boundary line in question. The portion of his report pertinent to the Green Bay section is as follows:

> "After descending the channel of the Menomonee 'to the centre of the most usual ship-channel of the Green bay of Lake Michigan,' the boundary is made to run 'thence through the centre of the most usual ship-channel of Green bay, to the middle of Lake Michigan.'
>
> From map No. 4, which accompanies this report, it may be inferred that the islands which are in the eastern part of Green bay would cause several ship channels. It is a well known fact to all who have any personal knowl-

edge of the navigation of this bay, that there are at least two ship-channels, which are in use by all classes and kinds of craft that navigate the great lakes. It would be next to an impossibility to collect the testimony that would be required to decide the question, which of these *is* the 'most usual ship-channel of Green bay.' And it is not easy to conceive any other mode (than by testimony) by which the 'most usual ship-channel could be ascertained. But suppose this method of collecting testimony practical: it might occur that all the evidence that could be obtained on the subject would prove that one of these channels is just as much in use as the other; in which case, it would only be shown that there is no such thing as the 'most usual ship-channel' in this part of the bay.

Although the term 'most usual ship-channel' is used in the description of the boundary, still it is rather to be presumed that this term was intended to imply in the act of Congress the best ship-channel of all that may be found in that portion of Green bay referred to. An equitable construction of the law would convey this idea; for, it is not to be presumed that, of two States bordering upon navigable ship-channels, either State would or could, in equity, claim to appropriate the best of these channels exclusively to herself.

If the interpretation of the term 'most usual ship-channel,' implying the best ship-channel, be correct, it will be necessary to make a complete hydrographic survey of all the channels that exist in that portion of Green bay east of the mouth of the Menomonee river, in order to discover the best ship-channel (if there be such) among all the ship-channels now in use in that part of the bay.

After this survey shall have been made, the particular channel along which the boundary shall run may be declared."

This engineer obviously found it impossible to locate "the center of the most usual ship channel of Green Bay" in the body of the bay. He evidently construed the description to refer to a ship channel running lengthwise of Green Bay and to mean the "best ship channel" rather than "the most usual" one. On his map he showed two ship channels running

lengthwise of Green Bay, one west of Chambers island and one between Chambers island and the Door peninsula. Captain Cram's report as to this section of the boundary line is so indefinite and inconclusive that it is not a certain aid in determining the proper location of the boundary line in the waters of Green Bay in 1840. It is unfortunate that the engineer sent for the very purpose of locating "the most usual ship channel of Green Bay" in 1840, reported that he was unable to do so; and this rather adds to the difficulty of now locating such a channel, instead of clarifying it.

I find as a fact that practically this entire body of water is one wide channel. This whole area outside the shoal water near the shore lines was traversed by ships in 1836. Having studied the maps and all testimony and records in evidence, which undoubtedly include all that are available, I find as a fact that there was no such thing as a "main channel" or a "most usual ship channel" in the body of Green Bay at the time of the adoption of said Acts of Congress. Ships came and went between Green Bay and Lake Michigan. They entered and left the mouth of the Menominee river. They went to and fro east of Chambers Island and west of Chambers Island. They sometimes followed the "Strawberry island passage" near the Door peninsula. They traveled from Lake Michigan to the city of Green Bay, at the head of the bay, and in so doing passed east of the mouth of the Menominee river. I repeat, I cannot find from any competent evidence that in 1836 there was any ship channel in the body of Green Bay that could properly be said to be the "most usual ship channel" or the "main channel" of said bay.

In the former case the court has established the right of Wisconsin to Chambers Island, and, of necessity, the waters between it and the mainland of the Door peninsula would belong to Wisconsin; so that we may eliminate the "Strawberry island passage" from our consideration and confine our inquiry to ascertaining the location of the "most usual ship channel" in the portion of Green Bay lying west of Chambers Island.

But this does not remove the difficulty, for, limiting our inquiry to this portion of Green Bay, we still find that there is no evidence whatever available upon which one could place a finding of any certain location of a "most usual ship channel" in this portion of Green Bay in 1836.

I therefore find that if, as a fact, there did exist in 1836 any such thing as the "most usual ship channel" in the body of Green Bay, its true location can not now be ascertained and the same can not now be definitely established.

Conclusions of Law on Contentions of the Parties as to Location of Boundary Line Under Congressional Acts.

Finding as I do, that the entire body of water constituting the portion of Green Bay lying west of Chambers Island was one "main" or "most usual" channel at the time of the Congressional Acts, where shall the boundary line be drawn in such body of water?

The description "middle of main channel" is not infrequently used in boundary descriptions, but in most instances it has been possible to locate it as a physical fact. This description occurs most frequently where a river is a boundary. This court discussed the phrase "center of the main channel," as applied to the Menominee river, in the opinion in the main case. The court said:

> "Captain Cram's first report to Congress, dated December, 1840, points out the impracticability of following the center of the main channel of the river:
>
> 'The "center" of the main channel of the Menominee river is made a part of the boundary. The river contains numerous islands, and consequently more than one channel, where these islands occur. It will be impossible in many of these cases to know which is the "main channel" without minute surveys. In many cases it was tried and found impossible to decide by a simple inspection or reconnaissance which was the "main channel". It should also be remarked here that the term "main channel" ap-

plied to the multiplicity of channels of the Menominee, would be somewhat ambiguous in any event—for, it may be asked—Is the main channel the widest channel of the river? Or is it the deepest? If it is the widest or deepst now, will it be the widest or deepest hereafter? Or shall the main channel be that through which the greater quantity of water shall be found to pass at the time of the survey? And if it should occur that two channels at the same island pass equal quantities of water—which would then be regarded as the boundary? These questions are sufficient to show the indefiniteness of the term "main channel"—There are also a few islands in the Brulé river to which similar questions might apply in reference to the term "main channel".'"

In *Iowa* v. *Illinois*, 147 U. S., 1, this court considered the boundary line between the states of Iowa and Illinois, where the Mississippi river was involved. The court said:

"When a navigable river constitutes the boundary between two independent states, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each state in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It is, therefore, laid down in all the recognized treatises on international law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining states up to which each state will on its side exercise jurisdiction."

Again the court said:

"* * * we are of opinion that the controlling consideration in this matter is that which preserves to each state equality in the right of navigation in the river. We therefore hold, in accordance with this view, that the true line in navigable rivers between the states of the Union which separates the jurisdiction of one from the other is the middle of the main channel of the river. Thus the jurisdiction of each state extends to the thread of the

stream, that is, to the 'mid-channel,' and, if there be several channels, to the middle of the principal one, or, rather, the one usually followed."

In *Louisiana* v. *Mississippi*, 202 U. S., 1, this court said:

"But we are of opinion that, on occasion, the principle of the thalweg is applicable, in respect of water boundaries, to sounds, bays, straits, gulfs, estuaries, and other arms of the sea.

As to boundary lakes and landlocked seas, where there is no necessary track of navigation, the line of demarcation is drawn in the middle, and this is true of narrow straits separating the lands of two different states; but whenever there is a deep-water sailing channel therein, it is thought by the publicists that the rule of the thalweg applies. 1 Martens (F. de) 2d ed. p. 134; Hall, sec. 38; Bluntschli, 5th ed., secs. 298, 299; 1 Oppenheim, pp. 254, 255."

In *Minnesota* v. *Wisconsin*, 252 U. S., 273, the court said:

"Manifestly, from the description heretofore given, the waters between Big island and Lake Superior were broad sheets without any definite uninterrupted deep channel extending throughout their entire length. Also, there was no steady, controlling current. Such vessels as plied there in 1846 and long thereafter moved with freedom in different directions. The evidence convinces us that as navigation gradually increased prior to 1890, the northerly course in Upper St. Louis bay commonly followed by vessels going to or coming from points above Big island was not along the narrow curving channel skirting Grassy point, but over the shorter one near the middle of the bay."

The court further said:

"The doctrine of thalweg, a modification of the more ancient principle which required equal division of territory, was adopted in order to preserve to each state equality of right in the beneficial use of the stream as a means of communication. Accordingly, the middle of the principal channel of navigation is commonly accepted as the boundary. Equality in the beneficial use often would be

defeated, rather than promoted, by fixing the boundary on a given line merely because it connects points of greatest depth. Deepest water and the principal navigable channel are not necessarily the same. The rule has direct reference to actual or probable use in the ordinary course and common experience shows that vessels do not follow a narrow crooked channel close to shore, however deep, when they can proceed on a safer and more direct one with sufficient water."

It certainly is proper to assume that Congress intended to treat the states of Michigan and Wisconsin equitably in the use of a portion of the navigable waters of Green Bay. The line passing "down the center of the most usual ship channel" would give the states equal rights in the use of said channel.

Equality between the states in a portion of Green Bay was evidently the dominant purposes of Congress. This being so, and the actual channel being unascertainable, I reach the conclusion that, under the law, in this landlocked bay, the geographical center of that portion of the bay involved would be the proper boundary. The portion of Green Bay involved is only that portion lying north of the mouth of the Menominee river, west of Chambers Island and south of a line drawn due west from the center of the Rock Island passage to the Michigan mainland. Roughly speaking, the boundary would follow the line A. B. C. on the map, and thence in a generally northward course in the center of that portion of the bay until it would intersect a line extended from the point Q on the map to the Michigan mainland, and thence eastward through the center of the Rock Island passage to the center of Lake Michigan. Wisconsin has no claim to any of the portion of Green Bay lying north of the last-mentioned line. Its rights are solely in the portion of Green Bay north of the mouth of the Menominee river, west of Chambers Island, and south of an extended line passing through the center of the Rock Island passage.

My own conclusion differs entirely from the contention of either of the parties. Both parties assume that the Enabling

Acts, in making reference to "the most usual ship channel of Green Bay," or "the main channel of Green Bay," intended a channel extending north and south lengthwise of Green Bay, and the foregoing findings of fact and conclusions of law are based on such assumption. I deem this assumption to be erroneous, as I shall undertake to demonstrate in the next division of this report.

Master's Construction of Congressional Acts.

In so far as it was involved in the former case, it seems to have been assumed by both parties that the description in the two Congressional Acts referred to a channel ("main channel" or "most usual ship channel") of Green Bay that extended lengthwise north and south. The court properly accepted this assumption, and said:

> "The evidence as to which of the two ship channels was the usual one at the time of the adoption of the Michigan Enabling Act is not only conflicting, but of such inconclusive character that, standing alone, we could base no decree upon it with any feeling of certainty. Living witnesses are no longer available; and tradition, recollection of statements made by persons long since dead,—if of any legitimate value,—deductions drawn from ancient documents, more or less cryptic, and inferences based on more recent uses of the channels or on their relative safety and convenience as indicated by physical characteristics, all relied upon in the absence of first-hand evidence, constitute at best most unsatisfactory substitutes. If it were necessary, we should, of course, undertake the task —as we should be bound to do—of reaching a conclusion from these dubious premises. But, it is not necessary, for, as in the case of the two sections of the boundary just discussed, the title of Wisconsin to the disputed area now in question is established by long possession and acquiescence; and this conclusion is justified by evidence and concessions of the most substantial character."

Counsel for both parties in the instant case again assume that the "channel" referred to in the Enabling Acts must be a channel extending lengthwise of Green Bay north and south.

Notwithstanding this assumption of counsel for both parties, I can not accept the premise as correct and undertake to apply the description of the Congressional Acts in such a manner, and I deem it my duty to make my own findings on the record before me, even though they may not coincide with the assumptions of counsel for both parties. The action is one praying for the true location of a boundary line. In an action of this character it is the duty of the court to establish the *true* boundary line, if possible, irrespective of the assumptions or claims that may be made by the parties.

Our polestar in this proceedings is the intent of Congress as expressed in the acts of 1836. Of necessity, we must view the situation in the light of the then-known facts in regard to the subject with which Congress was dealing. Assuming that Congress had all the evidence then available before it, it would have had *no* evidence whatever of "sailing courses," or soundings in Green Bay as now known. It was dealing with two bodies of wide and open water, namely, Lake Michigan and Green Bay. Both were practically uncharted. Congress merely undertook to draw a boundary line from "a point in the middle of Lake Michigan" to the mouth of the Menominee river, or, in the reverse order, from the mouth of the Menominee river into Lake Michigan.

What was the situation before Congress in 1836? There were two wide, unobstructed, and open bodies of water, traversed largely by sailing vessels that, traveling no certain courses, were compelled to "tack" as the wind required. The mouth of the Menominee river was fixed as one end of the boundary line, and "a point" in the middle of Lake Michigan was the other. Where should this line be drawn? With the somewhat crude and scientifically inaccurate maps of that day available to it, Congress found these two large bodies of water separated from each other by a series of islands running north and south between the northern end of the Door peninsula and the Michigan mainland. Through this group of islands there were at least five "passages" or channels. A

glance at the map will disclose the situation as it must have been apparent to the Congress, even with the limited information available in 1836. Among these islands and leading from the one large body of water to the other, were the Porte des Morts (Death's Door) passage, Detroit passage, Rock Island passage, St. Martin's passage, and Poverty Island passage.

I think it significant that the Wisconsin Territorial Act was first passed. In the Wisconsin Act the line was drawn "through the middle of Lake Michigan *to a point in the middle of said lake and opposite the main channel of Green Bay.*" This was the first course. In a practical way the line was described as if one were following a course and passing northward through the middle of Lake Michigan. This course stops in the middle of Lake Michigan "opposite the main channel of Green Bay." If the Congress had in mind "*a main channel* of Green Bay" that ran north and south lengthwise of Green Bay, some seventy or more miles, where would the "point" opposite *such* a "main channel" be? Such a description so applied would be an absurdity. Who could locate such "a point"? It is an impossibility. If, however, we construe the words "main channel" as I think Congress must have understood and intended to use them, in the light of the physical conditions and the information then possessed by Congress, we have no difficulty whatsoever. Congress located "a point" in the middle of Lake Michigan and fixed that point opposite "the main channel of Green Bay." Then continuing the line from the "point in the middle of Lake Michigan and opposite the main channel of Green Bay" it passed "*through said channel*" into Green Bay proper.

What was this "main channel" through which the line passed? It could not, in my judgment, be other than the *main* one of the channels that existed between Lake Michigan and Green Bay. Which one of the channels between these islands was the "main" or "most usual" channel could be readily ascertained by scientific and factual investigation. The Congress used a common and ordinary term used in boundaries. "The

main channel" of a river is a most common term in boundary descriptions. Whichever one of *these* island channels was *"the main channel"* of Green Bay was the one opposite which the *"point"* in Lake Michigan was fixed. Then the line proceeds from this "point" *"through said channel and* Green Bay to the mouth of the Menominee river." Nothing whatever is said about a channel to be followed *in* Green Bay after the line passed through the channel opposite the point in Lake Michigan.

If the description was intended to mean that the course must be through the main channel of the *body* of Green Bay to the mouth of the Menominee River, there was no need whatever of inserting the words "and Green Bay." Note the language: "through the middle of Lake Michigan *to a point* opposite the main channel of Green Bay and through said channel *and Green Bay* to the mouth of the Menominee river." (Italics mine.)

I can not escape the conclusion that Congress never meant to refer to a "main channel" in the *body* of Green Bay, by the language of the Wisconsin Act.

Some few months later Congress passed the Michigan Act, obviously with full knowledge of the Wisconsin Act. If the Wisconsin Act is construed as I have suggested, it not only is plain but also is wholly consistent with the Michigan Act. The description in the Michigan Act is in the reverse, and is: "down the center of the main channel of the same (Menominee river) to the center of the most usual ship channel of the Green Bay, thence *through* the center of the most usual ship channel of said bay to the middle of Lake Michigan."

Congress must have meant the descriptions to be identical in effect. They can be so reconciled. The whole difficulty lies in the term "to the center of the most usual ship channel of the Green Bay." The problem becomes simple when we consider that the Wisconsin Act was passed first and that the "main channel" therein referred to is the *main* one of the several channels leading from Lake Michigan into Green Bay.

This being the "main channel" referred to in the Wisconsin Act, applying the language of the Michigan Act passed later, the course of the boundary under the Michigan Act is from the mouth of the Menominee river "*to* the center" of this "main" or "most usual" channel leading from Green Bay into Lake Michigan, then "through the center" of said ship channel "to the middle of Lake Michigan,"—in other words, to the "point" in Lake Michigan opposite said channel, as described in the Wisconsin Act. Neither act attempted to describe any channel in the body of Green Bay between the mouth of the Menominee river and the "main channel" between the islands. In the Wisconsin Act, once the line passes through the main island channel it then goes through Green Bay to the mouth of the Menominee river. By reverse description the line goes from the mouth of the Menominee river to this "most usual" or "main" channel (among the islands), and through it to the point in the middle of Lake Michigan. I can not believe that Congress ever contemplated by these descriptions that the line should run directly east from the mouth of the Menominee river some seven and one-eighth miles to a modern sailing course and then turn practically at a right angle and proceed north as shown by the red line on the map. I think it apparent that Congress, with the information then before it, intended to draw a boundary line from a point in the middle of Lake Michigan opposite the main or most usual island channel leading into Green Bay, through the center of such channel into Green Bay, and thence by the most direct and navigable route to the mouth of the Menominee river. Such a line is consistent with the description in both acts; it is consistent with the known conditions as to the island channels; it is consistent with the fact that ships then sailed the waters of Green Bay generally and did not follow any definite channel or course therein.

To attempt to construe these Acts otherwise leaves an impossible description of a "point" opposite a "main channel" some seventy miles in length, and also calls for the location of a

"main" or "most usual ship channel" in Green Bay, where the whole expanse of water was one "main" or "most usual ship channel," traversed indiscriminately by the boats of that day.

There is some corroborative evidence in the record which supports the construction of the language of the Enabling Acts which I have suggested.

One Lucius Lyon was a former delegate from the territory of Michigan. It appears that he was in Washington in 1836, and, as senator-elect from the prospective state, was interested in the proceedings for the admission of Michigan into the Union. He wrote letters to his constituents in Michigan, excerpts from which are in the record. On February 21, 1836, he wrote to one Andrew Mack, of Detroit:

> "I have no doubt the committee will recommend our western boundary be so altered as to run down Lake Michigan to the Fox Islands, thence along the main ship channel *into* Green Bay and up the bay to the mouth of the Menominee river."

On the same date he wrote to Chas. C. Hascall, a member of the Michigan senate:

> "I believe the committees of both houses will be willing to propose to the legislature to assent to an alteration of our western boundary so that it may run from the northwest corner of the state of Indiana down Lake Michigan to the most western extremity of the most westerly of the Fox Islands, *thence through the middle of the main ship channel into Green Bay, thence through the bay to the mouth of the Menominee river.*" (Italics mine.)

These letters, written by a party vitally interested in the subject and with full knowledge of the situation, certainly are illuminating as to what was before Congress and what was its intent and understanding. Exactly what Lyon anticipated at the time is what Congress in fact did shortly thereafter.

No one can misunderstand where Lyon thought the line would run. It would go northward in Lake Michigan to the

Fox islands. This would be practically opposite the channels leading into Green Bay. Congress did not run the line to the Fox islands, but instead down the middle of Lake Michigan to "a point" opposite the main channel into Green Bay. This was substantially the course that Lyon predicted. Then, exactly as Lyon anticipated, it went *"along the main ship channel into Green Bay and up the bay to the mouth of the Menominee river."* I think there can be no doubt whatever that Lyon, on the ground at the time and investigating the situation before Congress, clearly understood that the "main channel" he was referring to was the main channel between the islands leading from Lake Michigan into Green Bay. I think Congress understood the situation exactly as did Lyon.

I am convinced from the language of the two Acts, and all the surrounding facts and circumstances, that Congress, in using the expressions "main channel" and "most usual ship channel," meant to refer to the main one of the channels between the islands that separate Green Bay and Lake Michigan, and not to a channel in the open body of Green Bay. Under the record there is no difficulty in locating such a channel as being the Rock Island passage.

Recommendations as to Green Bay Section.

I am conscious of the fact that, in view of my findings of fact, my recommendations for a decree as to the Green Bay section must be in the alternative. I can not avoid this. This I regret.

I therefore submit the following recommendations: (1) If the court accepts the Master's conclusion to the general effect that the channel referred to in the Acts of Congress is one between the islands that separate Green Bay and Lake Michigan, then the boundary line should be drawn from "a point in the middle of Lake Michigan opposite the center of the Rock Island passage, thence in a general westerly direction through the center of said passage, and thence in a course capable of

navigation by the most direct route to the mouth of the Menominee river. It would follow the red line on the map (R S Q) to the objective off Boyer's Bluff (marked by the letter Q), and thence in a direct line to a point approximately two miles west of the Chambers island light (the red line from Q to O on the map), and thence in a direct line approximately eleven miles to the center of the mouth of the Menominee river. The exact technical description of the line I have indicated is easily ascertainable, and can be correctly embodied in a decree. Such decree I recommend.

(2) If, however, I am in error in my construction of the Congressional Acts as applied to the situation, and the court holds, as counsel for both parties assume, that the terms "most usual ship channel" or "main channel" refer to a channel in the body of Green Bay proper, west of Chambers Island, then I recommend that the line be drawn in substantially the following manner: proceeding from the center of the mouth of the Menominee river—that is, the center between the pierheads as now located—thence north and eastward in the geographical center of the portion of Green Bay lying west of Chambers Island to a point where said line would intersect a line extended westward through the center of the Rock Island passage to the Michigan mainland, and thence eastward through the center of the Rock Island passage to the center of Lake Michigan. The description I have outlined could be readily ascertained technically and incorporated in a decree.

AS TO SO-CALLED GRASSY ISLAND.

Findings of Fact.

In the opinion in the original case this court said:

"We therefore hold, as to this section of the boundary, that from Lake Brulé to the mouth of the Menominee the line, which is now fixed and finally established by long acquiescence, follows the channels of the Brulé and Me-

nominee wherever they are free from islands; that wherever islands are encountered above the Qinnesec Falls the line follows the channel nearest the Wisconsin mainland, so as to throw all such islands into Michigan; and that wherever islands are encountered below the Quinnesec Falls the line follows the channel nearest the Michigan mainland, so as to throw all such islands into Wisconsin."

In the decree it is provided:

"* * * where islands occur in the Menominee river below the Quinnesec Falls, the line shall pass through the channel nearest the Michigan bank, so as to throw all such islands into Wisconsin. Provided further, that the land known as 'Merryman's island', being surveyed as part of sections 20 and 29, township 36 north, of range 28 west, of the Michigan Public Survey, and the land known as 'Sugar Island', being a part of lots 1 and 2, section 11, lot 6 of section 2, and lot 1 of section 3, township 31 north, of range 27 west, of the Michigan Public Survey, is determined to be part of the mainland of Michigan."

In the bill of complaint in the case at bar it is alleged:

"The complainant herein further says that the following part of the decree also is erroneous, being a part of the last sentence in the decree, to-wit:

"And the land known as Sugar Island, being a part of lots 1 and 2, section 11, lot 6 of section 2, and lot 1 of section 3, township 31 north, of range 27 west, of the Michigan Public Survey, is determined to be a part of the mainland of Michigan.'

Complainant says that lot 1 in section 11 of the Michigan township referred to does not appear to touch any part of the modern Sugar Island, that the land specified is not in any way insular but is a part of the mainland from the days of the earliest settlement survey, that lot 2 is meant to include the eastern portion of Sugar Island, but islands are understood to be not usually parts of lots unless so shown, that lot 6 appears to include the eastern tip of Grassy Island not mentioned in the decree and to lie westerly of Sugar Island; that Grassy Island was surveyed into lots in 1848 in contrast to Sugar Island which

was not; that lot 1 to section 3 includes the eastern half of Grassy or Carpenter Cook Co. Island adjacent to lot 6 of section 2; that the decision of the court does not specifically name Sugar Island, but gives the islands south of Quinnesec Falls in the Menominee River to Wisconsin. The decree gives Sugar Island to Michigan by determining that it is a part of the mainland but describes lands which only partially can be construed to cover Sugar Island and part of said description covers Grassy Island instead. Complainant alleges that this erroneous part of the decree should be modified to carry out the decision of the court."

Defendant admits that the language describing Sugar Island is erroneous, but avers that the error consists only in that unsurveyed land is treated as being part of adjoining lots according to public survey.

The complainant now contends that the legal description embodied in the decree covers part of so-called Sugar Island and part of Grassy Island.

I find that the techinical description in the decree is erroneous. In fact, this is conceded by the state of Michigan. It does include a portion of the tract which complainant contends was an island called "Grassy Island," and which Wisconsin now claims belongs to it under the decree, as being included within the description of "all islands below Quinnesec Falls," which were given to Wisconsin.

I find as a fact that the area in controversy has not been proven to be an island in 1836, or at any other time. This area is a low, marshy tract of land, unoccupied except by a railroad bridge, and some times partly used for pasturage. In times of high water it was partially submerged, and there is some evidence of a boat having passed between it and the mainland at a time of high water many years ago. It may be that there was a bayou extending for some distance between the mainland and this tract. I find that said area was subaqueous land, and not an island proper within the purpose and intent of the decree in awarding "all islands in the Menominee River below Quinnesec Falls" to the state of Wisconsin.

Furthermore, I find that Michigan has had uninterrupted possession of the so-called "Grassy Island" for a long period of years. The technical description embodied in the decree is erroneous in that it describes part of the tract called Grassy Island and part of the tract called Sugar Island. The description followed the Michigan Public Survey as a part of the Michigan mainland. The public survey may not be complete. The sole fact question is whether or not the tract referred to as "Grassy Island" is proven to have been an island, and hence belonging to Wisconsin, under the general terms of the opinion giving all the islands below Quinnesec Falls to Wisconsin. I find that this tract was not an island in 1836 and is not now an island, but is part of the Michigan mainland. I further find that Michigan has for many years exercised jurisdiction and dominion over this tract without objection by Wisconsin.

Conclusions of Law as to Grassy Island.

I conclude that "Grassy Island" did not pass to the state of Wisconsin under the opinion and decree in the former case, and does not so pass under the record in this case.

Recommendation as to Grassy Island.

I recommend that the decree be amended; that the technical legal description therein contained be eliminated; and that the decree recite that the area of land commonly called "Grassy Island" be decreed to be a part of the mainland of Michigan and awarded to said state.

AS TO SUGAR ISLAND.

Findings of Fact.

I find that the tract of land commonly known as "Sugar Island" is not an island in fact. It may be true that in some of the ancient maps in evidence there are indications that a

small island may have existed at one time in the vicinity of this tract, but if so, its precise location and extent can not now be ascertained. The tract now described as "Sugar Island" consists to some extent of so-called "made ground" or "fill". For something like sixty years the state of Michigan has exercised full and complete jurisdiction over this tract, levying and collecting taxes thereon without any objection by the state of Wisconsin. I can not find in the record any such evidence of the insular character of this tract as would justify a disturbance of Michigan's right thereto. The decree in the former case awarded this tract to the state of Michigan. The technical legal description therein contained is misleading, if not erroneous and incomplete, but I find that the tract is not insular but is, in fact, a part of the mainland of Michigan.

Conclusions of Law as to Sugar Island.

Under the established facts, I conclude that the entire area known as Sugar Island belongs to the state of Michigan, under the rule of dominion and acquiescence as announced in the main case, and also because the same is not proven to have ever been an island.

Recommendation as to Sugar Island.

I recommend that either an accurate survey be made of Sugar Island and a correct legal description be embodied in the decree, or that the decree be modified by eliminating the legal description therein in so far as it refers to Sugar Island, and simply providing that the tract of land known as Sugar Island is decreed to be part of the mainland of Michigan.

I deem it not out of place to call attention to the fact that a new permanent concrete bridge has been erected across the Menominee river, connecting the cities of Menominee in Michigan and Marinette in Wisconsin, and this has been done by action of the legislature of the two states.

Extensive dredging has been made by the federal government in the Menominee river near its mouth, and the natural course of the river has been somewhat changed. Permanent piers have been erected, which definitely fix the "mouth of the Menominee river," as now existing.

I think that recitals in the decree as to these permanent monuments would make for certainty and clarity as to the true boundary line.

RECAPITULATION.

Summarizing my conclusions and recommendations they are as follows:

(1) That as to the Green Bay section the boundary line be established from a point in the middle of Lake Michigan opposite the center of the Rock Island passage, thence in a general westerly direction through the center of said passage, thence in a course capable of navigation by the most direct route to the mouth of the Menominee river.

In a general way such a line would follow the red line on the map as indicated by the letters R. S. Q. to the objective off Boyers Bluff—(Q) on the map; thence in a direct line to a point approximately two miles west of the Chambers Island light (Q to O on the map) thence in a direct line approximately eleven miles to the center of the mouth of the Menominee river.

(2) In the alternative, and in the event only, that the court adopts the view that the "main channel" or "most usual ship channel" refers to a ship channel in that part of the body of Green Bay lying west of Chambers Island, as assumed by both parties, then the boundary line should be drawn as follows: from the center of the mouth of the Menominee river (the center between the pierheads as now located) thence north and eastward in the geographical center of the portion

of Green Bay lying west of Chambers Island to a point where said line would intersect a line extended westward through the center of the Rock Island passage to the Michigan mainland, and thence eastward through the center of the Rock Island passage to the center of Lake Michigan.

(3) As to the tract of land known as Grassy Island, I recommend that the decree should be modified to make it clear and definite that said tract in its entirety is not an island and that it belongs to the state of Michigan.

(4) As to the tract of land known as Sugar Island, I recommend that the legal description in the decree should be eliminated and all of said tract decreed to be a part of the mainland of Michigan.

Being aware of the fact that, in view of my recommendations, I can not now present the complete form of decree to be rendered, I deem it not inappropriate to suggest that, whatever conclusion is reached by the court, I shall be willing, as part of my duties as Special Master, to supervise the formulation of the same into a decree correctly embodying the necessary and appropriate technical descriptions.

Respectfully submitted,

FREDERICK F. FAVILLE,
Special Master.

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IN THE

Supreme Court of the United States

STATE OF WISCONSIN, *Plaintiff.*

vs.

STATE OF MICHIGAN, *Defendant.*

ORIGINAL

No. [illegible] 12

SUPPLEMENTAL REPORT OF SPECIAL MASTER

and

PROPOSED DECREE.

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IN THE

Supreme Court of the United States

STATE OF WISCONSIN, *Plaintiff,* vs. STATE OF MICHIGAN, *Defendant.*		ORIGINAL No. 15

SUPPLEMENTAL REPORT OF SPECIAL MASTER.

To the Supreme Court of the United States:

In the year 1926 the state of Michigan brought an original action in this court to determine the boundary line between the states of Michigan and Wisconsin. The opinion in that case is reported in 270 U. S. 295. Subsequently a decree was entered in said action, which is reported in 272 U. S. 398.

In November, 1932, this action was brought by the state of Wisconsin as plaintiff against the state of Michigan as defendant, the plaintiff alleging that certain errors of description were contained in the decree entered in the former case, and praying that the true boundary line be established insofar as two certain so-called islands in the Menominee river are concerned, and also as to the *waters*, as distinguished from the *islands*, in a portion of the body of water known as Green Bay. This court appointed me as Special Master to take evidence and report findings of fact and conclusions of law in said case.

This I did. Exceptions were taken to my report and the cause was duly submitted to the court.

An opinion was filed in said cause on May 20, 1935. (Law Ed. Adv. Opinions, vol. 79, p. 879.) In said opinion it is provided:

"The case is referred to the special master, and he is directed to prepare and submit to the court a form of decree which will give effect to this decision. Inasmuch as the preparation of the decree may involve the ascertainment of physical facts and the formulation of technical descriptions, the master is authorized to hear counsel, take evidence and procure such assistance, if any, as may be necessary to enable him conveniently and promptly to discharge the duties here imposed upon him. He may call upon counsel to propose forms of decree. He is directed to give them opportunity to submit objections to the form prepared by him and to include the objections, if any, in his report."

Pursuant to said directions I proceeded to take evidence of expert and lay witnesses to ascertain as nearly as possible an accurate description of the true location of the boundary line involved in this action. Counsel for both parties have presented to me proposed decrees embodying their respective claims as to the correct location of said boundary line and arguments in support thereof. I have considered all of said matters, and have made a careful personal inspection of the *locus in quo* in addition to taking the testimony of witnesses, and have formulated and present herewith a form of decree, which, in my judgment, conforms to the opinion of the court and accurately and definitely locates said boundary line. Insofar as possible I have located the same with reference to established monuments which are well known and constantly

used by navigators and fishermen who traverse the waters of Green Bay.

It will aid in considering the proposed decree if we start at the portion of the line in the Menominee River where the disputed tracts known as "Grassy Island" and "Sugar Island" are located. As to these the opinion provides:

"The decree will appropriately define the tracts called 'Grassy Island' and 'Sugar Island' and declare them to belong to Michigan."

There is a new and permanent bridge, called "The Interstate Bridge," on U. S. Highway 41, crossing the Menominee River and connecting the city of Marinette, in the state of Wisconsin, with the city of Menominee, in the state of Michigan. The tracts known as "Grassy Island" and "Sugar Island" lie between said bridge and the pierheads at the mouth of the Menominee River. The boundary line upstream from said bridge is not involved in this proceeding. By drawing the boundary line from a point on said Interstate Bridge downstream to said pierheads, both "Grassy Island" and "Sugar Island" are placed wholly on the Michigan side of said boundary line. This plan avoids the necessity of attempting to make an accurate survey of said so-called islands. It appeared at the hearing before me that, owing to defects in the public survey, it would be extremely difficult, if not impossible, to make a survey of said tracts that would conform to and "tie up" with the public survey.

With the consent of counsel for both parties, I appointed two competent engineers, one from Michigan and one from Wisconsin, to accurately locate and mark the boundary line from said Interstate Bridge to the mouth of the Menominee river, and tie the same to permanent monuments on courses and distances substantially in the

center of the channel of said river. I have embodied the description of said line in the second paragraph in the proposed decree which I submit. For the convenience of the court, I attach to this report a copy of the chart prepared by said engineers showing said portion of said boundary line. Said chart is marked Exhibit A. This ties this portion of the line to fixed and permanent monuments, and accomplishes the purpose of placing all of "Grassy Island" and "Sugar Island" within the state of Michigan, as required by the opinion of the court.

The Act creating the territory of Wisconsin and the Michigan Enabling Act were identical in effect and described the boundary line as following "the main" or "most usual ship" channel in Green Bay betwen the mouth of the Menominee river and Lake Michigan.

In the opinion the court says:

"The evidence shows, and the master found: When these Acts were passed, there was no 'main' or 'most usual ship' channel. Movements of sailing vessels, then used, were not limited to any channel and, except to avoid islands, shoals and reefs, they went directly to their destinations. Ships came and went between Lake Michigan and Green Bay to and from the mouth of the Menominee, and the southerly end of the bay, the site of the city of Green Bay. They passed east and west of Chambers Island and through the Strawberry passage. Neither state has ever exercised jurisdiction over the triangular area at the mouth of the Menominee or over any other waters of the bay that are now in controversy.

"As it is impossible to identify any channel in the bay as that indicated by the Acts referred to, the intention of Congress must be otherwise ascertained."

The court further says:

"And it confidently may be assumed that when fixing the boundary lines in the waters of the bay Congress intended that Michigan and the State to be erected out of Wisconsin Territory should have equality of right and opportunity in respect of these waters, including navigation, fishing and other uses. On the facts found, equality of right can best be attained by a division of the area as nearly equal as conveniently may be made, having regard to the matters heretofore litigated and finally adjudged between these States."

Again the court says:

"The decree to be entered in this case will establish the boundary through and along, or near, the middle of the waters of Green Bay that are here involved."

I construe the opinion as definitely holding that, it being impossible to identify any "main" or "most usual ship" channel in Green Bay as conforming to the descriptions contained in the Acts of Congress, the court adopts the rule of equality of water area in the portion of Green Bay involved as applicable to the situation.

Referring more specifically to the line the court says:

"That line commences at a point midway between the piers at the harbor entrance of the Menominee River; thence east by south seven and one-eighth miles; thence approximately north by east one-eighth east, about eight and seven-eighths miles; thence to and along a line in or near the middle of the bay to a point west of the Rock Island passage; thence easterly by courses and distances to be designated through that passage to the boundary in the middle of Lake Michigan."

It is this line that I have endeavored to definitely locate and accurately describe in the proposed decree.

I attach to this report a copy of a chart which was admitted in evidence, with various lines thereon showing the contentions of the parties and the line as fixed by me in the proposed decree. This chart is marked Exhibit B.

I.

The line from the pierheads at the harbor entrance of the Menominee river east by south seven and one-eighth miles is shown on said chart as the line A B.

The evidence shows that this line extends exactly one-half the distance from the pierheads at the harbor entrance to the opposite Wisconsin shore. For the purposes of this report, and as a matter of convenience, I shall refer to the line A B as a "base line." It gives us not only a base line for the water area to be divided, but a definite point (B) from which to draw the line in a general northerly direction therefrom equally dividing the waters of Green Bay "that are here involved."

II.

The court, in its opinion, describes the next course from point B as follows: "thence approximately north by east one-eighth east about eight and seven-eighths miles." This carries the line to a point two miles west of the Chambers Island light. It is marked on the chart as the line B C. The line B X on the chart indicates the exact geographical center of the bay, but it can not be adopted because it traverses Chambers Island, which belongs wholly to Wisconsin, and, if established, might lead to confusion as to matters involving said island. The point X, however, is the location of a permanent lighthouse maintained by the United States government, and is very

valuable as a monument because of its relation to the boundary line.

III.

From the point west of Chambers Island (C on the chart), the opinion provides that the line shall pass "*to* and along a line in or near the middle of the bay to a point west of the Rock Island passage." It is therefore necessary to draw a line from the point C, west of Chambers Island, to a point practically in the center of the bay. This is done by the line C K on the chart. This line is approximately five and one-eighth miles long. I deem this line to be in exact accord with the direction of the court in the opinion. It carries the line approximately "to" the middle of the bay, and it practically compensates Michigan for the loss of area by the diversion from the center of the bay caused by carrying the line to the west of Chambers Island. Furthermore, the point K is on a direct line between the Chambers Island light (X) and the Whaleback shoal gas buoy light (L) which is of much practical advantage to navigators and fishermen.

IV.

From the point K on the chart the next course and distance is accurately set forth in the proposed decree, and is shown on the chart by the line K L. The establishment of this line has a twofold advantage; it is almost exactly in the geographical center of the bay, and it also is directly in line with the Chambers Island light (X) to the south and the Whaleback shoal gas buoy (L) to the north. The Chambers Island light is a permanent and well-known guidepost. At point L is located a gas buoy marking the eastern end of the Whaleback shoal. This buoy is maintained by the United States. It is removed

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

Original, No. 49 12 In Equity

STATE OF WISCONSIN,

Plaintiff,

v.

STATE OF MICHIGAN,

Defendant.

REPLY TO DEFENDANT'S ANSWER TO BILL OF COMPLAINT

JAMES E. FINNEGAN,
Attorney General of Wisconsin,

J. E. MESSERSCHMIDT,
Assistant Attorney General,

Attorneys for the State of Wisconsin.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

Original, No. 20 In Equity

STATE OF WISCONSIN,

Plaintiff,

v.

STATE OF MICHIGAN,

Defendant.

REPLY TO DEFENDANT'S ANSWER TO BILL OF COMPLAINT

Now comes the above named plaintiff, the State of Wisconsin, by James E. Finnegan, Attorney General, and J. E. Messerschmidt, Assistant Attorney General, and for reply to the answer to the bill of complaint herein says:

I.

Replying to the allegations of paragraph 2 of the defendant's answer to the bill of complaint, plaintiff herein admits that the final draft of the decree was prepared in

one of the offices of Mr. Justice Sutherland of the Supreme Court in the absence of Mr. Sutherland, and alleges that the erroneous description of the boundary in the Green Bay section was taken from the draft of the proposed decree submitted by the State of Michigan, a copy of which is made a part of the bill of complaint and marked Exhibit "D"; and that the counsel for the State of Wisconsin were informed that said description was drafted by Thomas R. Hasley, city engineer of the city of Menominee, Michigan.

Plaintiff denies the allegation of the answer that with the exception of one typographical error the description in the decree is correct, and describes a line which is well known.

Plaintiff alleges that he has no knowledge or information that an error occurred in said decree in the courses and distances describing the boundary through Green Bay by the insertion of the word "by" between north and east in the third course and, therefore, denies the same. Plaintiff denies that by eliminating the said word "by" thereby changing the third course to read "northeast seven-eighths east", reconciles the discrepancy, and states that he has no knowledge or information that the line then follows the chartered sailing course, passing westerly of Chambers Island and through the Rock Island passage into Lake Michigan; and plaintiff alleges that the description by courses and distances in the Green Bay section, even after the elimination of the word "by", does not give a description that complies and is in conformity with the decision of the court in said original suit.

II.

Replying to the allegations of paragraph 3 of the answer to the bill of complaint, plaintiff alleges that it has no knowledge that the description concerning Sugar Island

was furnished to Mr. Robert M. Reiser by a Mr. Hillis, and that the same was received by telephone or telegram and therefore denies the same. This plaintiff denies the allegation that the error concerning Sugar Island did not come to the attention of the defendant until the filing of the bill of complaint, but alleges that this error became known to the defendant at the same time that the error became known concerning the error in the description in Green Bay in 1929.

III.

Replying to the allegations of paragraph 4 of the answer to the bill of complaint, plaintiff denies that there never was any claim on the part of the State of Wisconsin, the defendant in the said original suit, bearing upon the course of the boundary in Green Bay, other than as a jurisdiction over the islands involved until after the filing of said opinion, but alleges the fact to be that the main contention was to ascertain whether the so-called Strawberry channel was the main channel of Green Bay or the channel which passed from the mouth of the Menominee river, thence between Chambers Island and the Michigan mainland and then in a northerly direction opposite to the channel between St. Martin's Island and Rock Island then into Lake Michigan. The State of Wisconsin, the defendant in that suit, introduced evidence of shipping courses that passed through said last named channel to prove that said channel was the main shipping channel of Green Bay, but not for the purpose of showing the boundary line to follow the shipping course, and alleges the fact to be that the shipping courses in said main channel of Green Bay have varied at different times and that such shipping courses are not the line of boundary between the two states in said Green Bay, but that the center of

the main channel is the boundary through said Green Bay. This is clear from the description in the enabling act of both the states of Wisconsin and Michigan.

Plaintiff, in paragraph 1 of the bill of complaint in the original suit, refers to the enabling act, passed by Congress, approved June 15, 1836, on the admission of the State of Michigan into the union and described a portion of the boundary of Michigan pertinent to the issues therein, a part of said description which is pertinent to the issues in the present suit was as follows:

> "* * * thence in a direct line to the nearest headwater of the Menominee river; thence through the middle of that fork of said river first touched by said line, to the main channel of said Menominee river; thence down the center of the main channel of the same, to the center of the most usual ship channel of the Green Bay of Lake Michigan; thence through the center of the most usual ship channel of said Bay to the middle of Lake Michigan; * * *."

In paragraph 15 of the bill of complaint of the State of Michigan in the original action, the identical quotation is given from the new constitution of the State of Michigan adopted in 1850; so also in the proposed constitution of Michigan of the year 1867, and again in paragraph 16, the identical quotation is given from the new constitution adopted in 1908.

Plaintiff alleges in paragraph 17 of the bill of complaint of the State of Michigan in the original suit, that the part of the descripion which is here pertinent of the boundary between Michigan and Wisconsin in the enabling act of the State of Wisconsin, is as follows:

> "* * * beginning at the northeast corner of the State of Illinois, that is to say, at a point in the center of Lake Michigan, where the line of 42 degrees and

30 minutes of north latitude crosses the same; thence running with the boundary line of the State of Michigan through Lake Michigan, Green Bay, to the mouth of the Menominee River; thence up the main channel of said river to the Brule River; * * *."

It thus appears that the description of the boundary between the State of Michigan and the State of Wisconsin, as given in both enabling acts of the State of Michigan and that of Wisconsin, calls for the boundary from the mouth of the Menominee river to the center of Lake Michigan as passing through the center of the main channel of Green Bay, and that this was the position taken by the State of Michigan in the original action, as well as the position of the State of Wisconsin, so that that question was not litigated as there was no controversy or issue between the two states on that point. This position was also adopted in the decision in the original suit.

Plaintiff alleges that the description as given in the decree does not carry into effect the decision of the court as expressed in the opinion, neither does it carry into effect the accepted boundary line as clearly shown in the description of the boundary of both states.

IV.

Replying to the allegations of paragraph 5 of the answer to the bill of complaint, this plaintiff alleges that the answer herein given to paragraph 4 of the answer as alleged in the preceding paragraph 3 is also applicable to this paragraph.

V.

Replying to the allegations of paragraph 6 of the answer to the bill of complaint, this plaintiff admits that

the issue between the parties in the original action was mainly jurisdiction over the Islands in Green Bay and the entrance thereto, and that the question at issue was whether the so-called Strawberry channel was the main channel of Green Bay or the channel between Chambers Island and the mainland and that between St. Martin's Island and Rock Island, it being conceded according to the expressed language in the enabling acts of both states that when the main channel was definitely fixed that the center of said channel would be the boundary.

It is further admitted that there was no shipping course at the time of the admission of Michigan or Wisconsin entering the Menominee river from Green Bay, but alleges that the main channel of the Bay, the center of which was the boundary of the two states in Green Bay, touched the mouth of the Menominee river. Plaintiff further alleges that nothing contained in the brief of Wisconsin indicates that Wisconsin considered that the shipping courses in Green Bay were synonymous with the main shipping channel. This plaintiff admits that there was discussion with Justice Sutherland as to the formation of the decree concerning Sugar Island and that the representatives of the State of Michigan informed him that they had had control and jurisdiction of Sugar Island for a long period of time, and that in this connection the discussion also brought out that the mouth of the Menominee river had been changed by dredging and that the State of Wisconsin had had possession of the land and buildings thereon south of the present mouth of the river for a long period of time. Justice Sutherland stated at that time that the opinion did not intend to disturb the sovereignty over any territory over which the other state had or was actually exercising jurisdiction, and that the alleged compromise was between giving Sugar Island to the State of Michigan

and that part of the territory south and southwest of the mouth of the Menominee river as changed by the dredging of said mouth of the river to Wisconsin, but denies that there was any compromise as to the waters in Green Bay.

This plaintiff alleges that the description of the boundary in the waters of Green Bay were prepared by the State of Michigan, whose representatives were conversant with the situation in said waters, and that they assured Justice Sutherland and the attorneys for the State of Wisconsin that the technical description as presented by them carried into effect the decision of the court, but this plaintiff alleges the fact to be that said description does not carry into effect the decision of the court and does not carry out the plain wording of the boundary of the state in Green Bay as being in the center of the main channel of said Bay.

This plaintiff alleges that neither the attorneys for the State of Wisconsin nor those of Michigan had any right to change the boundary of the state as determined in the enabling act by any compromise, and that the boundary as fixed in the decree, even after the changing of the word "by" as alleged by the defendant, did in any way carry into effect the decision of the court in the original action.

VI.

Replying to the allegations of paragraph 7 of the answer to the bill of complaint, this plaintiff admits that the basis of the entire opinion was the doctrine of acquiescence, and that the decision did not intend to disturb existing conditions as to jurisdiction. This plaintiff alleges that he has no knowledge as to the allegation that all of the area between the banks of the Menominee river at or near the mouth thereof as shown upon Exhibit "B" of defendant's answer, is subaqueous land except the land known or described as Sugar Island, and therefore denies the same

to put the defendant on his proof, and the plaintiff reserving to itself the benefit of all proper admissions and disclosures contained in said paragraph 7 of the defendant's answer joins issue upon said answer and each allegation thereof, and this plaintiff is ready to prove all the matters contained in paragraph 7 of its bill of complaint.

VII.

Replying to the allegations of paragraph 8 of the answer to the bill of complaint, the plaintiff denies that the errors in the description of the boundary in Green Bay and the description and location of Sugar Island are apparent upon the face of the complaint, and denies that the defendant herein did not discover the error as to Sugar Island until the filing of the bill.

VIII.

Replying to the allegations of paragraph 9 of the answer to the bill of complaint, this plaintiff denies that the triangle of the area of water in dispute has been under actual jurisdiction of the state of Michigan for many years or any time prior to the entrance of the decree, and denies that the controversy arose between Wisconsin and Michigan by reason of a lane of open water maintained through the ice, since the decree was entered, but alleges that said lane of open water has been maintained for many years and that the citizens of Wisconsin have fished on said so-called triangle of water for a long period of time prior to the entry of said decree; and denies that the State of Michigan has exercised dominion over the said triangle of water and the fishing therein.

IX.

Replying to the allegations in paragraph 10 of the answer to the bill of complaint, the State of Wisconsin alleges that in addition to the jurisdiction which it loses as alleged in the bill of complaint, if the court should hold that the boundary of the state in Green Bay is as contended for by the defendant herein, then the State of Wisconsin would lose a vast area of water in Green Bay and that the jurisdiction of the State of Wisconsin over a large area of said Green Bay would be taken away; that prior to the entry of the decree herein, Michigan has not exerted any jurisdiction or dominion over any area of Green Bay south and west of the line marking the boundary of the State of Wisconsin to Green Bay, namely, the center of the main channel as alleged and described in the bill of complaint of the plaintiff. As to whether the so-called Grassy Island was formed by the recession of waters and the filling of subaqueous property, this plaintiff does not have sufficient knowledge to form a belief and therefore denies the same.

Plaintiff further alleges as an answer to the demands of the answer of the defendant, that the boundary in Green Bay should be definitely determined, specifically marked, and that Green Bay is a great fishing center and that it is necessary in order to preserve the rights of the party engaged in navigation and fishing thereby, to determine to what laws they are subject in different sections of the Bay; that the fish and game laws of Michigan do not always coincide with those of Wisconsin; that while there are open seasons in Wisconsin there may be closed seasons in the Michigan areas for the same game; that Michigan authorities may require license from fishermen with different fees than Wisconsin; that a great many features of law enforcement point to the conclusion that the line of demarcation between the jurisdiction of the two states should be

in the center of the main channel; that to have the game laws of Michigan enforced within a mile of Washington island is unthinkable, likewise to enforce the Wisconsin game laws within a short distance of the Michigan land is equally objectionable.

Plaintiff further alleges that the shipping course in Green Bay has constantly changed and that at the time when the boundary was fixed as early as 1836 sailing vessels instead of steamers were used in navigation; that these ships had to back against the winds at times and were obliged to stay a respectable distance from the coast; that their course was often a zigzag course, tacking against winds from various directions; that sailing vessels could not pursue a course close to shore for obvious reasons; that the center of the main channel was therefore described as the boundary in the enabling acts of Wisconsin and Michigan.

Plaintiff further alleges that the boundary contended for in the bill of complaint follows the middle of the said main channel of Green Bay; that the starting point is the center of the harbor entrance of said Menominee river starting from the outer end of the pier at Menominee as being in harmony not only with the opinion of the court, but also with the decree as entered; that the next fixed point is a point half way from Chambers island to the Michigan mainland measured from the water's edge at the narrowest channel; that this is a definite point which may be easily determined. The third point is the west end of the Whaleback Shoal which is approximately in the center of the channel extending from the mainland of Michigan and the peninsula in Wisconsin directly east of it; that it is approximately in the center and is selected as a point which may be easily marked. The fourth point is one halfway from the water's edge adjacent at Boyer's Bluff to

the water's edge on the Michigan mainland at the mouth of Bark river. This is a point which is thus definitely and permanently fixed and may be easily ascertained. The fifth point is one half-way from the water's edge at Boyer's Bluff to Driscoll Shoal. What is said as to the fourth point is also applicable to this point. The sixth and last point is the light on St. Martin's Shoal which is approximately in the center of the passage between St. Martin's island and Rock island, and is a point that can be definitely fixed and marked. From said point the boundary goes to the center of Lake Michigan in the same direction as the present decree of the court designates, which follows the course of the ships to the east as pursued in 1836.

It is further alleged that the said main channel of Green Bay is practically navigable in all its area.

JAMES E. FINNEGAN,
Attorney General of Wisconsin,

J. E. MESSERSCHMIDT,
Assistant Attorney General,

Attorneys for the State of Wisconsin.

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FILED
MAR 11 19
CHARLES ELMORE

IN THE SUPREME COURT
of the
UNITED STATES

OCTOBER TERM, 1932

ORIGINAL, NO. ~~25~~ 12 IN EQUITY

STATE OF WISCONSIN,
Plaintiff.

vs.

STATE OF MICHIGAN,
Defendant.

DEFENDANT'S ANSWER TO AFFIRMATIVE ALLEGATIONS OF PLAINTIFF'S REPLY

PATRICK H. O'BRIEN,
Attorney General of Michigan,

MEREDITH P. SAWYER,
Special Counsel,

Attorneys for Defendant.

FRANKLIN DEKLEINE CO., PRINTERS AND BINDERS, LANSING

IN THE SUPREME COURT
of the
UNITED STATES

OCTOBER TERM, 1932

ORIGINAL, NO. 20 IN EQUITY

STATE OF WISCONSIN,
Plaintiff.

vs.

STATE OF MICHIGAN,
Defendant.

DEFENDANT'S ANSWER TO AFFIRMATIVE ALLEGATIONS OF PLAINTIFF'S REPLY

Now comes the above named defendant, the State of Michigan, by Patrick H. O'Brien, Attorney General, and Meredith P. Sawyer, Special Counsel, and for the purpose of traversing certain affirmative allegations in plaintiff's reply to this defendant's answer, says:

—2—

—1—

Referring to the allegation in paragraph one (1) of plaintiff's reply to the effect that the erroneous description of the boundary in Green Bay was drafted by Thomas R. Hasley, defendant denies the same and in explanation thereof, reasserts that such error first appears in the courses and distances given in the printed form of Michigan's proposed amendments to Wisconsin's proposed decree and was occasioned by an error in transcribing the courses and distances as given in the testimony of said Thomas R. Hasley and shown upon the plaintiff's exhibits; that such error is typographical only, is readily ascertainable and that when eliminated (the word "by") the decree correctly defines the boundary as it was intended to be determined and is in full accord with the findings and opinion of this court.

That such boundary so defined (with the word "by" eliminated) follows the middle of the main channel of the Menominee River to its mouth, passes thence in a direct line by the shortest possible course to "the middle of the most usual ship channel of the Green Bay of Lake Michigan" and thence follows the middle of the most usual ship channel to the middle of Lake Michigan.

—2—

Referring to the allegations of paragraph two (2) of plaintiff's reply, the defendant reaffirms the allegations of its answer and in further explanation thereof, says: That the decree of this court as written, expresses the determination of the court that the land known as "Sugar Island" was to be treated as mainland of Michigan for the purpose of determining the boundary and that the error therein consists only in defining said land as a part of certain lots of the Government Survey of Mich-

igan, when in fact, said land is outside of the exterior lines of said lots and a channel in said river passes between said land and said lots. Defendant alleges that the location of the meander line of said lots was unknown to defendant until the filing of the Bill of Complaint herein.

—3—

Referring to the allegations of paragraph three (3) of plaintiff's reply, this defendant reasserts that no definite description of the boundary in Green Bay had been considered by either party prior to the filing of the opinion of this court, and denies that Wisconsin offered any evidence of shipping courses that passed from the mouth of the Menominee River as alleged; denies that the Enabling Acts of both States define the boundary as the middle of the main channel of Green Bay; reasserts that such definition is "the middle of the most usual ship channel"; denies that the line here proposed by Wisconsin conforms to such definition and the findings and opinion of this court; and reasserts that the definition of such boundary as contained in the decree of this court, modified by the elimination of the typographical error (the word "by") conforms exactly with such definition, findings and opinion.

In this respect, Michigan alleges that during the trial of the former case the issue was as expressed, jurisdiction over the islands lying between the two main ship channels from Lake Michigan through Green Bay to the Village (now city) of Green Bay. Michigan further alleges that this court declined to determine from the evidence which of these main ship channels was the "most usual ship channel" because as expressed in the opinion, possession of such islands by Wisconsin acquiesced in by Michigan over a long period of time, made

it mandatory that the channel thus adopted by acquiescence be considered the boundary.

These findings were carried into the decree of this court by defining the line of the boundary to be along the sailing courses given on the Government charts through the channels thus determined.

It was first necessary to define the line from the middle of the mouth of the Menominee River to the middle of said ship channel—the definition of the boundary being silent on this sector—it was computed from the chart along the shortest possible line between the monuments. A line from the river mouth at a right angle with the shipping course—the course was computed by angle of departure from the shipping course and the distance scaled from the chart. This definition was in issue between the parties at the time of the settlement of said decree and the position of Michigan in that regard was adopted by the court as being correct in accordance with the definition of the Enabling Acts of both States—the findings and opinion of this court and the concessions and agreement of the parties in relation to alteration of the channel of the Menominee River by dredging.

—4—

Referring to the allegations of paragraph four (4) of plaintiff's reply, defendant here reasserts the allegations of the last paragraph hereof and of paragraph five (5) of its answer.

—5—

Referring to the allegations of paragraph five (5) of plaintiff's reply, defendant denies that the question at issue between the parties was the "main channel of Green Bay" and denies that the center of any main channel of Green Bay touched the mouth of the Menominee

River; denies that the decree of this court was the result of a compromise between the parties as therein set forth; denies that the plain wording of the boundary in Green Bay is the "center of the main channel of said Bay" and admits that the attorneys for neither party had any right to change the boundary by compromise.

In this respect, Michigan alleges that in said former case, Wisconsin claimed to have held possession of certain islands in the Menominee River below Quinnesec Falls. That the Wisconsin Enabling Act proposed a boundary which would place all islands in the Menominee River Below Quinnesec Falls in Wisconsin. That this Enabling Act gave color of title to Wisconsin to all these islands. That under such color of title, Wisconsin's possession of a part of such islands would extend to all of them, *in the absence of actual possession of any of them by Michigan.*

Michigan, on the other hand, contended that it had not acquiesced in such possession because it had always possessed two large islands in said portion of said river, to-wit: Merryman's Island and Sugar Island.

The opinion and decree of this court were to the effect that the lands possessed by Michigan were not islands and, consequently, did not affect Wisconsin's claimed possession, and the boundary was determined according to Wisconsin's claims—safeguarding the interests of Michigan by providing that "Sugar Island" was to be treated as mainland of Michigan—Merryman Island had been surveyed in both States and the Wisconsin survey cancelled, and the island submerged by a hydro-electric development.

At the same time, issue was taken between the parties as to the course of the main channel of the Menominee River near its mouth, having been changed by dredging, and this court had before it the original Government

plats showing bank lines of said river at the time of the first survey, and later Government charts showing the dredged channel in the lower end of said River and into Green Bay, and the location of the ship channel from the City of Green Bay passing west of Chambers Island and through the Rock Island Passage into Lake Michigan, and that this Court, with the expressed approval of both parties, decreed from the evidence at hand and in accord with the theory of acquiescence that the boundary passed through the middle of the dredged channel of the Menominee River, to a point midway between the harbor piers, and thence in a direct line by the shortest possible course to the middle of the ship channel, which had been determined by acquiescence to be the boundary.

—6—

No affirmative allegations appearing in paragraph six (6) of plaintiff's reply, issue thereon is already complete.

—7—

No affirmative allegations appearing in paragraph seven (7) of plaintiff's reply, issue thereon is already complete.

—8—

Referring to the allegations of paragraph eight (8) of plaintiff's reply, defendant denies that the open water lane through the ice of Green Bay was maintained prior to the entry of said decree and denies that citizens of Wisconsin have fished on the water alleged for a long period of time, except as licensed so to do by the State of Michigan.

Referring to the allegations of paragraph nine (9) of plaintiff's reply, defendant denies that Wisconsin would lose jurisdiction over any area over which it has ever had complete jurisdiction, and alleges that except as a no man's land may have existed at certain points along said boundary by reason of uncertainty as to the exact location thereof, under former definitions, the decree of this court (modified by striking out the word "by") defines the boundary as it has existed and been acquiesced in by both parties.

Michigan admits that at the time when the boundary was fixed by definition in its Enabling Act, sailing vessels instead of steamers were used in navigation and in this respect alleges that at said period "Mackinaw Boats" which could be either sailed or rowed were the form of ship most usual.

Michigan denies that the sailing ships had to back against the winds at times and alleges that it is impossible to propel a sailboat backwards against a wind.

Michigan admits that sailboats, desiring to reach an upwind destination, do so by a zigzag course, termed "tacking"; and denies that sailing vessels cannot pursue a course close to shore, and in this respect alleges that the captains of sailing vessels were accustomed to follow close to the eastern shores and the islands in Green Bay because of the existence of deep water close to such land and high bluffs on such lands, which made convenient landmarks, and were accustomed to shun the western shores of Green Bay because of the wide bench of shoal water and absence of land marks.

Michigan alleges that the sailing courses given on the Government charts represent the line to which ships shall adhere as closely as possible in traversing the several

passages. That such courses are determined in relation to the natural hazards of navigation and are the best evidence of the location of the center of the most usual ship channel. That a sailing vessel in tacking against a wind would lay a course to cross and recross such sailing course—the length of the leg on each tack depending on the direction of the wind and character of water on either side of such sailing course.

Michigan further alleges that by reason of the common use of such charts by fishermen and navigators, the location of such sailing courses is well known to them and the position of a vessel in relation to such sailing course is always apparent to her navigator and usually a matter of record in her log book.

Michigan further alleges that the line contended for by plaintiff, State of Wisconsin, is not the center of any channel, and could not be traversed by ships because of the existence of shoals, and because of uncertainty, would not be known to fishermen and navigators and would at all times be very difficult of determination.

Specifically—plaintiff's second point is indefinite and uncertain and cannot be easily determined because no method of marking same is possible and no course and distance from any recognizable monument is given and the distance from proposed monuments is so great that only a minute survey could determine said point with even a reasonable degree of accuracy.

Plaintiff's third point is an apparent invasion of Michigan water and is illogical as a point in the center of a ship channel, since being a dangerous shoal it is manifestly a part of the exterior boundary of such channel. It is true that such point may be determined when reached, but the determination would be hazardous, if not disastrous, to navigators and impossible when ice conditions prevail.

The fourth point is halfway between monuments so distant as to be usually invisible from one another and out of all lines of shipping.

The fifth point also is uncertain because Driscoll Shoal is invisible and the point is out of the channel.

The sixth point is untenable for the same reason as the third.

Defendant positively alleges that no ship could follow the line proposed by plaintiff except with extensive and unusual calculations, and only a vessel of very shallow draft could proceed over said courses and that the same is impractical as a State boundary.

PATRICK H. O'BRIEN,
Attorney General of Michigan,

MEREDITH P. SAWYER,
Special Counsel,

Attorneys for Defendant.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

STATE OF WISCONSIN,	*Plaintiff,*	IN EQUITY.
vs.		
STATE OF MICHIGAN,	*Defendant.*	No. ~~29~~ Original. 12

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

STATE OF WISCONSIN, *Plaintiff,* vs. STATE OF MICHIGAN, *Defendant.*		IN EQUITY. No. 20 Original.

PRELIMINARY REPORT OF THE SPECIAL MASTER.

To the Supreme Court of the United States:

In the cause entitled State of Wisconsin v. State of Michigan, being Original No. 20, October Term, 1932, this Honorable Court appointed me as Special Master, by its order dated January 23, 1933, as follows:

> "It is further ordered that Frederick F. Faville, of Des Moines, Iowa, be and he is hereby, appointed master in this cause, with authority, upon the filing of the replication or a waiver thereof, to summon witnesses, issue subpoenas, and to take such evidence as may be introduced and such as he may deem it necessary to call for. The master is directed to make findings of fact and conclusions of law, and to submit the same to this Court with all convenient speed, together with his recommendations for a decree. The findings, conclusions and recommendations of the master shall be subject to consideration, revision or approval by the Court. The master shall be allowed his actual expenses and a reasonable compensation for his services to be fixed hereafter by the Court. The allowances to him, the compensation paid to his stenographic

and clerical assistants, and the cost of printing his report shall be charged against and be borne by the parties in such proportions as the Court hereafter may direct. If the appointment herein made of a master is not accepted, or if the place becomes vacant during the recess of the Court, the Chief Justice shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein."

The parties appeared before me as Special Master, by their respective counsel, at public hearings in Madison, Wisconsin, Menominee, Michigan, Lansing, Michigan, and Chicago, Illinois, at various times between February 21, 1933, and April 15, 1934, and have presented their evidence and have fully argued said cause orally and in writing.

Now, pursuant to the above-mentioned order, I have reported the testimony and the exhibits received by me as Special Master, by filing all of the same in the office of the Clerk of this Court, duly certified by me; and I herewith submit to the Court my findings of fact, conclusions of law, and recommendations as to a decree.

Respectfully submitted,

FREDERICK F. FAVILLE,
Special Master.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

STATE OF WISCONSIN, *Plaintiff,*		IN EQUITY.
vs.		No. 20 Original.
STATE OF MICHIGAN, *Defendant.*		

REPORT OF THE SPECIAL MASTER.

INTRODUCTORY.

This action is the aftermath of the case of Michigan v. Wisconsin in this court, and in which the opinion is reported in 270 U. S., 295. Said action involved the boundary line between the Upper Peninsula of Michigan and the State of Wisconsin.

Following the filing of the opinion in said case a decree was entered, which is reported in 272 U. S., 398. About five years later this action was commenced by the State of Wisconsin against the State of Michigan to correct the decree in said action as to a portion of said boundary line, and to determine and establish the true location of the same.

THE PLEADINGS.

The bill of complaint in this action was filed by the State of Wisconsin on November 7, 1932. In said bill it is alleged that in the year 1926, the defendant, State of Michigan, brought an original suit in this court, to determine the boundary between the states of Michigan and Wisconsin from the mouth of the Montreal river at Lake Superior to the ship channel entrance from Lake Michigan into Green Bay. It is alleged that, after full submission in this court, an opinion by Mr. Justice Sutherland was delivered March 1, 1926. I quote a portion of the opinion as set out in the bill:

> "This is an original suit in equity brought in this court to determine the boundary between the states of Michigan and Wisconsin from the mouth of the Montreal river at Lake Superior to the ship channel entrance from Lake Michigan into Green Bay. By the Enabling Act of June 15, 1836, chap. 99, 5 Stat. at L. 49, under which Michigan became a state in 1837 (January 26) chap. 6, 5 Stat. at L. 144, this boundary is described as follows:
>
> '* * * thence (the mouth of the Montreal river) through the middle of the main channel of the said River Montreal, to the middle of the Lake of the Desert; thence, in a direct line to the nearest headwater of the Menominee river; thence, through the middle of that fork of the said river first touched by the said line, to the main channel of the said Menominee river; thence, down the center of the main channel of the same, to the center of the most usual ship channel of the Green Bay of Lake Michigan; thence, through the center of the most usual ship channel of the said bay to the middle of Lake Michigan; * * *'
>
> The territory of Wisconsin was created by an act of April 20, 1836, chap. 545, 5 Stat. at L. 54, pp. 10, 11, and this boundary is there described in the reverse direction:
>
> '* * * to a point in the middle of said lake (Michigan), and opposite the main channel of Green Bay, and through said channel and Green Bay to the mouth of the Menominee river; thence, through the middle of the main channel of said river, to that head of said river nearest to the Lake of the Desert; thence in a direct line, to the

middle of said lake; thence through the middle of the main channel of the Montreal river, to its mouth; * * *'

The only difference between the two descriptions is that in the former the call is for the 'most usual ship channel,' while in the latter it is for the 'main channel', of Green Bay. In the Wisconsin Enabling Act of Augus 6, 1846, chap. 89, 9 Stat. at L., 56, 57, under which the state was admitted by the Act of May 29, 1848, chap. 50, 9 Stat. at L. 233, this boundary is described as '* * * running with the boundary line of the state of Michigan, through Lake Michigan, Green Bay, to the mouth of the Menominee river, thence up the channel of said river to the Brulé river; then up said last mentioned river to Lake Brulé; thence along the southern shore of Lake Brulé in a direct line to the center of the channel between Middle and South islands, in the Lake of the Desert; thence in a direct line to the headwaters of the Montreal river, as marked upon the survey made by Captain Cram; thence down the main channel of the Montreal river to the middle of Lake Superior; * * *'

That, to prevent all disputes in reference to the jurisdiction of islands in the said Brulé and Menominee rivers, the line be so run as to include within the jurisdiction of Michigan all the islands in the Brulé and Menominee rivers (to the extent in which said rivers are adopted as a boundary) down to, and inclusive, of the Quinnesec Falls of the Menominee; and from thence the line shall be so run as to include within the jurisdiction of Wisconsin all of the islands in the Menominee river, from the falls aforesaid down to the junction of said river with Green Bay: Provided, That the adjustment of boundary, as fixed in this act, between Wisconsin and Michigan shall not be binding on Congress, unless the same shall be ratified by the state of Michigan on or before the first day of June, one thousand eight hundred and forty-eight.'

The history of events leading up to the present controversy extends over a period of eighty years, and the evidence, including a multitude of official and other maps and documents, constitutes a long and involved record. The case is reviewed in voluminous but well prepared briefs, and was helpfully argued at the bar. This mass of material we have examined with the care properly due

the importance of the issue and the high character of the parties litigant; but much of it may be put aside as unnecessary for final consideration, since the determination we have reached depends upon a comparatively few decisive facts and circumstances, either undisputed or clearly established.

In the briefs and oral arguments the boundary is divided for purposes of convenient discussion into three distinct sections, namely (1) The Montreal river section, extending from the mouth of the Montreal river to the Lake of the Desert and thence to the headwaters of the Menominee river (to Lake Brulé); (2) the Menominee river section, extending from its headwaters (or from Lake Brulé) to Green Bay; and (3) the Green Bay section, extending from the last-named point through the center of the most usual ship channel of the Green Bay to Lake Michigan. Although our ultimate determination in respect of these three sections rests upon the same basic principle, they are so distinct in their physical characteristics and in respect of much of the evidence peculiarly applicable to each apart from the others, that our conclusions will be more clearly formulated and better understood if we adopt the same plan in the examination of the questions which follows.

The Montreal River Section."

(The part of the opinion referring to this section is omitted here as no controversy has been raised concerning it for the decree carries into effect this part of the opinion.)

"The Menominee River Section.

The description in the Michigan Enabling Act of this section of the boundary begins at the headwaters of the Menominee river nearest to the Lake of the Desert in a direct line, 'thence, through the middle of that fork of the said river first touched by the said line, to the main channel of the said Menominee river; thence, down the center of the main channel of the same, to the center of the most usual ship channel of the Green Bay.'

The description in the act creating the Territory of Wisconsin is the same, but in the opposite direction:

"* * * thence through the middle of the main channel of said (Menominee) river, to the head of said river nearest to the Lake of the Desert; thence in a direct line to the middle of said lake; * * *"

But the description in the Wisconsin Enabling Act contains important differences:

"* * * thence up the channel of said (Menominee) river to the Brulé river; thence up said last-mentioned river to Lake Brulé; thence along the southern shore of Lake Brulé in a direct line to the center of the channel between Middle and South islands, in the lake of the Desert; * * *"

Or, stated in the order of the Michigan act:

From the center of the channel between Middle and South islands in the Lake of the Desert in a direct line to the southern shore of Lake Brulé; thence along the southern shore of Lake Brulé to the Brulé river; thence down the Brulé river to the Menominee; thence down the channel of the Menominee to its mouth.

The evidence shows that Lake Brulé is not the head of the Menominee nearest to the Lake of the Desert, as called for by the Michigan Enabling Act, though the Brulé river is the principal tributary of the Menominee; and the inference is pretty clear that the change of description was made in the Wisconsin Enabling Act as a part of a general readjustment of the boundary. At any rate, since this part of the line is not in controversy, we need not consider the matter except as it may reflect light upon the effect of, and the question of Michigan's acquiescence in, the further provision, that, to prevent disputes as to jurisdiction, the line shall be so run as to include within the jurisdiction of Michigan all islands in the Brulé and Menominee down to and including the Quinnesec Falls of the Menominee, and thence so as to include within the jurisdiction of Wisconsin all islands in the Menominee below the falls. As to this part of the line, the contention of Wisconsin is that the description in the Wisconsin Enabling Act was in effect a proposed adjustment of the boundary as an undividable unit, and that Michigan, by the Constitution of 1850, having expressly adopted that part of the line from the Lake of the Desert

to Lake Brulé, cannot be heard to say that she did not also adopt the adjustment of the line in respect of the islands. There is force in this contention, and especially so in view of the fact that the change from the nearest headwater of the Menonimee to Lake Brulé operated to give Michigan additional territory. To permit her to reap the benefit of the adjustment so far as it is to her advantage and reject it to the extent that it is advantageous to her sister state would be plainly inequitable. We prefer, however, to rest our determination upon the conclusion, fully justified by the record, that—whatever were the rights of the respective states in respect of the islands in question immediately upon the adoption of the Constitution of 1850—Wisconsin, for a period of more than half a century following that time, had the undisputed and undisturbed possession of substantially all of the islands in the river below the Quinnesec Falls, and, without reference to the main channel of the river, exercised jurisdiction and dominion over them with the knowledge and acquiescence of the complainant.

Captain Cram's first report to Congress, dated December, 1840, points out the impracticability of following the center of the main channel of the river:

"The "center" of the main channel of the Menominee river is made a part of the boundary. The river contains numerous islands, and consequently more than one channel, where these islands occur. It will be impossible in many of these cases to know which is the "main channel" without minute surveys. In many cases it was tried and found impossible to decide by a simple inspection or reconnaisance which was the "main channel". It should also be remarked here that the term "main channel" applied to the multiplicity of channels of the Menominee, would be somewhat ambiguous in any event—for, it may be asked—Is the main channel the widest channel of the river? Or is it the deepest? If it is the widest or deepest now, will it be the widest or deepest hereafter? Or shall the main channel be that through which the greater quantity of water shall be found to pass at the time of the survey? And if it should occur that two channels at the same island pass equal quantities of water—which would then be regarded as the boundary? These questions are suffi-

cient to show the indefiniteness of the term "main channel"—There are also a few islands in the Brulé river to which similar questions might apply in reference to the term "main channel".

To avoid all ambiguity in reference to these channels, it might be specified in the act defining the boundary, that in ascending the stream, the boundary shall follow the extreme left hand channel of the Brulé and the extreme right hand channel of the Menominee down to a well known point of the river—say Pe-me-ne Falls; and thence to follow the extreme left hand channel of the remainder of the Menominee to its mouth. Such a division would leave most of the islands in Michigan and the remainder in Wisconsin, and would avoid much expense in minute surveys to ascertain the "main channel" and would leave no indefiniteness upon this part of the boundary. The free use of either channel for the purposes of navigation would, from an established principle of law be open at all times to the citizens of either state, and the islands would be nearly distributed in equal proportions between the two states.'

Following the date of this report in respect of the impossibility—or extreme difficulty, practically amounting to that—of locating the boundary in accordance with the provisions of the Michigan Enabling Act, and, it fairly may be assumed, with a view of effectuating Captain Cram's recommendation, the Michigan legislature passed the resolution already referred to, calling upon Congress to cause the boundary to be surveyed and marked in conformity with the manifest general intent of the Michigan Enabling Act, and requesting the delegation of the state in Congress to use their efforts to secure such action. This was followed, as already stated, by the introduction of the bills in the Senate and the subsequent insertion, by agreement between the members of Congress from Michigan and the Wisconsin delegate, of the provision in the Wisconsin Enabling Act dividing the islands in acocrdance with Captain Cram's suggestion, except in a particular not important here.

In 1854, the survey of all the islands below Quinnesec Falls as a part of Wisconsin was directed by the United States Surveyor General for Wisconsin, and such survey

was immediately begun and thereafter continuously prosecuted. The evidence, in our opinion, fairly shows that, as early as 1879, the greater part in area of all of them had been thus surveyed and platted as belonging to Wisconsin, including many which would fall on what Michigan claims is the Michigan side of the main channel. On behalf of Michigan, it is strongly contended that to this there are important exceptions. But, without going into details, it is enough to say that the clear weight of the evidence is to the contrary. It is true that so-called Island No. 8, or Merryman's Island, was surveyed as in both states; that the Wisconsin survey was subsequently cancelled; and that, thereafter, exclusive jurisdiction over the tract of land constituting it was exercised by Michigan. It is said that, nevertheless, the 'island' is now claimed by Wisconsin; but, on the contrary, Wisconsin concedes that it belongs to Michigan. The fact is that the tract was originally considered to be an island and, consequently, surveyed as a part of Wisconsin. Upon further investigation, it was found by the United States surveyor not to be an island, but, in reality, a part of the Michigan mainland. The Wisconsin survey was accordingly cancelled and the title of Michigan thereafter fully conceded. Two other so-called islands of small area in the same vicinity are in like situation.

Some of these islands, comparatively small in area and of little consequence, have never been surveyed or any definite acts of dominion exercise over them by either state. But to this we attach no importance. The assertion and exercise of dominion by Wisconsin over the islands on the Michigan side of the channel was begun and has continued in virtue of, and in reliance upon, the readjustment of the boundary set forth in the Wisconsin Enabling Act. The rule is well settled in respect of individual claimants that actual possession of a part of a tract by one who claims the larger tract, under color of title describing it, extends his possession to the entire tract in the absence of actual adverse possession of some part of it by another. *Clarke's Lessee* v. *Courtney*, 5 Pet., 319, 354; *Hunnicutt* v. *Peyton*, 102 U. S., 333, 368; *Ellicott* v. *Pearl*, 10 Pet., 412, 442; *Smith* v. *Gale*, 144 U. S., 509, 525, 526; *Montoya* v. *Gonzales*, 232 U. S., 375, 377;

Houston Oil Co. v. *Goodrich*, 213 Fed., 136, 142. Upon like grounds and with equal reason, under circumstances such as are here disclosed, the principle of the rule applies where states are the rival claimants. It results that the Wisconsin Enabling Act, together with the Act of Admission, gave color of title in that state to all of the islands within the limits there described; and that her original and continued possession, assertion and exercise of dominion and jurisdiction over a part of these islands, pursuant to such legislation and with the acquiescence of Michigan, extended Wisconsin's possession, dominion and jurisdiction to all of them, in the absence of actual possession of, or exercise of dominion over, any territory within the boundary by Michigan. The fact that the islands constitute separated tracts of land is of no consequence here, whatever its effect might be under other conditions. In applying the rule, the area within the described boundary, both land and water, must be considered as together constituting a single tract of territory.

We therefore hold, as to this section of the boundary, that from Lake Brulé to the mouth of the Menominee the line, which is now fixed and finally established by long acquiescence, follows the channels of the Brulé and Menominee wherever they are free from islands; that whenever islands are encountered above the Quinnesec Falls the line follows the channel nearest the Wisconsin mainland, so as to throw all such islands into Michigan; and that wherever islands are encountered below the Quinnesec Falls the line follows the channel nearest the Michigan mainland, so as to throw all such islands into Wisconsin.

The Green Bay Section.

In determining the boundary through this section, the question is not embarrassed by differences of description. The calls of the Michigan Enabling Act are down the channel of the Menominee to 'the center of the most usual ship channel of the Green Bay of Lake Michigan; thence through the center of the most usual ship channel of the said bay to the middle of Lake Michigan.' The Wisconsin Enabling Act calls for the same boundary.

The evidence shows that there are two distinct ship channels, to either of which this description might apply.

From the mouth of the Menominee, the channel, according to the Michigan claim, proceeds across the waters of Green Bay in an easterly direction until near the westerly shore of the Door county peninsula; thence, in close proximity to the shore, in a northerly direction to a point opposite Death's Door channel (or Porte des Morts); thence through that channel into Lake Michigan. The channel claimed by Wisconsin, after leaving the mouth of the Menominee, turns to the north and pursues a northerly direction to a point opposite the Rock Island passage which lies between Rock Island and St. Martin's Island; thence through the Rock Island passage into Lake Michigan. The territory in dispute lies between these rival channels, and embraces two groups of islands; (1) Chambers Island, the Strawberry Islands, and a few others, small and unnamed, all within the main waters of Green Bay west of the Door county peninsula; and (2) Rock, Washington, Detroit and Plum Islands, lying between Death's Door channel and the Rock Island passage, at the north end of the peninsula. The evidence as to which of the two ship channels was the usual one at the time of the adoption of the Michigan Enabling Act is not only conflicting, but of such inconclusive character that, standing alone, we could base no decree upon it with any feeling of certainty. Living witnesses are no longer available; and tradition, recollection of statements made by persons long since dead,—if of any legitimate value,—deductions drawn from ancient documents, more or less cryptic, and inferences based on more recent uses of the channels or on their relative safety and convenience as indicated by physical characteristics, all relied upon in the absence of first-hand evidence constitute at best most unsatisfactory substitutes. If it were necessary, we should, of course, undertake the task—as we should be bound to do—of reaching a conclusion from these dubious premises. But it is not necessary, for, as in the case of the two sections of the boundary just discussed, the title of Wisconsin to the disputed area now in question is established by long possession and acquiescence; and this conclusion is justified by evidence and concessions of the most substantial character.

There is evidence of acts of dominion and possession of some of the disputed islands while Wisconsin was yet a

territory. Almost from the day of her admission, the state has continuously possessed, asserted title and exercised jurisdiction and dominion over all of the islands within the boundary claimed by her. In support of this general statement, the following, among other things, may be cited: On March 21, 1855, Washington, Detroit, Rock and Plum islands, described as being in the waters of Green Bay in Door county, were organized by an act of the Wisconsin legislature as the town of Washington, Wis. Laws 1855, chap. 210. A census taken the same year by the town clerk showed a population of 318, which has since grown, it is said, to about 1,000. Since before that time, the United States Land Department, by its surveys, plats, and sales of public lands, has uniformly and notoriously recognized the islands as a part of Wisconsin, without objection on the part of Michigan. Indeed, as early as 1837, they were surveyed and platted as a part of Wisconsin territory. A large number of maps published and available to the public during the years between 1837 and 1878, without exception, show the islands as a part of Wisconsin; and during the same time they do not appear in any survey or upon any map as belonging to Michigan. Never, so far as we are able to find from the record, have they been recognized in any practical way as a part of Michigan or, prior to the commencement of this suit, claimed by that state.

The evidence in respect to the other group of islands, while perhaps not so complete, is definite and clear to the same effect. The taxation of lands on Chambers Island began while Wisconsin was still a territory. In 1861, voters on that island participated in a Wisconsin election. A history of Door county, introduced by complainant, recites that the island constituted an organized town forming a part of Door County, Wisconsin, as early as 1867. Evidence of early and continued recognition and treatment of the island as part of Wisconsin by the United States through its surveys, etc., is to the same effect as that in respect of the other group. And the evidence is likewise the same in respect of the uniform appearance of Chambers Island and the other small islands of the group upon the old maps as a part of Wisconsin, and their absence from Michigan surveys and maps. The absence

of evidence of specific acts of dominion over the Strawberry and the other small islands of this group is easily understood and does not affect the result. They are of little consequence, lying well within the boundary as claimed by Wisconsin, easterly from Chambers Island and near the westerly shore of the Door county peninsula. They appear on all maps as, and have never been regarded or treated otherwise than, a part of Door county. It is impossible to give them a status differing from that of the larger island and the peninsula, between and within the shadows of which they lie.

That Wisconsin since statehood has continuously asserted title and has exercised complete and exclusive dominion over all the islands of both groups is really not a serious issue. Indeed, the bill of complaint avers that Wisconsin had possessed herself of, and exercised sovereignty over, the islands, including Washington, Plum, the Strawberries, and numerous other valuable islands, and has excluded and continues to exclude the state of Michigan from her rights thereto; and, more particularly, that 'Wisconsin has for many years disregarded the true and rightful boundary * * * and has for a long time past possessed and does now possess, and has asserted and does now assert, civil, criminal and political jurisdiction over those portions of the territory within the Michigan boundaries above described as the Montreal river section, the Menominee river section, and Green Bay sections of the disputed territory, aggregating approximately 255,000 acres, * * * and has unlawfully taxed and still continues to unlawfully tax said property, * * *.' The explanation relied upon is that the state of Michigan, as a result of her excusable ignorance, has not been aware of the real facts and, therefore, should not be held to have lost rights by long acquiescence which she otherwise might have had. This view cannot be accepted and may be dismissed with a reference to what we have already said as to the same defense in respect to the Montreal river section.

In respect of the controversy as a whole, and each of the three sections, the words of this court in *Indiana* v. *Kentucky*, 136 U. S., 509, are singularly apposite and conclusive:

'It was over seventy years after Indiana became a state before this suit was commenced, and during all this period she never asserted any claim by legal proceedings to the tract in question. She states in her bill that all the time since her admission Kentucky has claimed the Green River island to be within her limits and has asserted and exercised jurisdiction over it, and thus excluded Indiana therefrom, in defiance of her authority and contrary to her rights. Why then did she delay to assert by proper proceedings her claim to the premises? On the day she became a state her right to Green River island, if she ever had any, was as perfect and complete as it ever could be. On that day, according to the allegations of her bill of complaint, Kentucky was claiming and exercising, and has done so ever since, the rights of sovereignty both as to soil and jurisdiction over the land. On that day, and for many years afterwards, as justly and forcibly observed by counsel, there were perhaps scores of living witnesses whose testimony would have settled, to the exclusion of a reasonable doubt, the pivotal fact upon which the rights of the two states now hinge, and yet she waited for over seventy years before asserting any claim whatever to the island, and during all those years she never exercised or attempted to exercise a single right of sovereignty or ownership over its soil. It is not shown, as he adds, that an officer of hers executed any process, civil or criminal, within it, or that a citizen residing upon it was a voter at her polls, or a juror in her courts, or that a deed to any of its lands is to be found on her records, or that any taxes were collected from residents upon it for her revenues.

The long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the state of Kentucky, such omission to take any steps to assert her present claim by the state of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion

and sovereignty over it, is conclusive of the nation's title and rightful authority.'

The result is that complainant has failed to maintain her case in any particular; and that the claims of Wisconsin as to the location of the boundary in each of the three sections are sustained.

The decree, therefore, will be for Wisconsin, costs to be divided between the parties in accordance with the general rule in cases of this character. *North Dakota* v. *Minnesota*, 263 U. S., 583. The boundary seems to be sufficiently defined for all purposes of future possession and jurisdiction; but the parties, or either of them, if so advised, may within thirty days submit the form of a decree more particularly to carry this opinion into effect; failing which, a simple decree dismissing the bill will be entered.

It is so ordered."

The bill of complaint alleges that, following the announcement of said opinion, a form of decree was submitted by special counsel for the state of Wisconsin, which is attached as an exhibit to the bill of complaint and is as follows:

"This cause having been heard and submitted upon certain questions, and the court having considered the same and announced its conclusions in an opinion delivered March 1, 1926 (270 U. S., 295),

It is ordered, adjudged and decreed:

1. That the boundary between the States of Michigan and Wisconsin along the following course be and it is hereby fixed and finally established as follows:

Beginning at the boundary line between the State of Michigan and the State of Wisconsin in the middle of Lake Michigan and opposite the most usual ship channel leading into Green Bay from said lake, thence in a direct line to the middle of the most usual ship channel into Green Bay, thence along the midde of said channel which is north of Rock Island and north and west of Chambers Island, to the main channel of the Menominee River, thence along the main channel of said Menominee River and the Brulé River, wherever the said rivers are free of islands, to Lake Brulé, provided, that wherever islands are encountered in either of said rivers the boundary line

follows along the channel nearest the Michigan mainland so as to throw all such islands between the mouth of said Menominee River and the Quinnesec Falls extending between Section 6, Township 38 North of Range 20 West of the Wisconsin survey, and Section 8, Township 39 North of Range 30 West of the Michigan survey, in said river into Wisconsin, and wherever islands are encountered in said rivers between said Quinnesec Falls and Lake Brulé, the boundary follows the channel nearest the Wisconsin mainland so as to throw all such islands into Michigan, thence along the southern shore of Lake Brulé in a direct line to the center of the channel between the Middle and South Islands in the Lake of the Desert, thence in a direct line to the headwaters of the Montreal River, as marked upon the survey made by Captain Cram, said line between Lake Brulé and the headwaters of said Montreal River to follow the line surveyed, marked, established and identified by William A. Burt in 1847, thence down the main channel of the Montreal River, being sometimes known as the East Branch of the Montreal River to the mouth thereof. * * *"

The bill alleges that to this proposed form of decree the state of Michigan filed objections as follows:

"The above named plaintiff now comes and objects to the form and substance of the decree proposed by the defendant in said cause for the reasons that the provisions of said decree are contrary to the manifest intentions of this court as expressed in its opinion and are against the rights of the plaintiff.

First Objection.

That the description in said decree is in the reverse order from that given in the opinion and in the statutory enactments and that as a result thereof plaintiff would be deprived of jurisdiction over an area of considerable extent in the waters of Green Bay and in that section of the Menominee River known as the Quinnesec Falls, and that the description of the boundary through Green Bay is too indefinite and uncertain and should be by courses and distances as shown upon the Government charts in evidence in the case.

Second Objection.

That the said proposed decree does not in any way define what are to be considered islands in the Menominee River and that by the language of said decree the rights of plaintiff to the lands now held by it known as Merryman's Island and Sugar Island are jeopardized."

It is further alleged that later the state of Michigan filed its motion to amend the proposed decree as follows:

"Comes now the said plaintiff and moves the court to amend the proposed decree heretofore filed by defendant by striking out that portion of said decree describing the boundary between the plaintiff and defendant states and insert in lieu thereof the following:

'From Lake Superior through the middle of the main channel of the Montreal River, to the headwaters thereof, as established in the survey of Captain Cram at the Junction of Pine River and Lehman's Creek, thence along the line of the survey of William A. Burt, of 1847, to the center of the channel between Middle and South Islands in Lake Vieux Desert, thence continuing along the line of said survey to the shore of Lake Brulé, thence along the southerly shore of Lake Brulé, to the center of the main channel of the River Brulé, thence down the center of the main channel of the Rivers Brulé and Menominee, to the center of the harbor entrance of said Menominee River, thence, east by south, seven and one-half miles, to the center of the most usual ship channel of the Green Bay, thence along said channel, north by east, one-eighth east, eight and seven-eighths miles, thence continuing along said ship channel north by east, seven-eighths east, twenty-seven miles, thence continuing along said ship channel, east one-fourth north, ten and one-fourth miles, thence east three-fourths north, to the boundary between the States of Michigan and the State of Wisconsin, in Lake Michigan. Provided, that, that section of the boundary in the Brulé and Menominee Rivers, shall follow the main channel thereof, except that where islands occur in the Brulé River, and in the Menominee River, down to, and inclusive of the Quinnesec Falls, the line shall pass through the channel nearest the Wisconsin bank, so as to throw all such islands into Michigan, and where islands

occur in the Menominee River below Quinnesec Falls, the line shall pass through the channel nearest the Michigan bank, so as to throw all such islands into Wisconsin. Provided, further, that no land now occupied or taxed as a part of the State of Michigan, shall be considered as an island under the provision of the last clause hereof."

The bill alleges that a number of conferences were held between the attorneys for the parties, and that the attorneys for Michigan submitted a proposed draft of the boundary in Green Bay; that the description is highly technical; that both parties accepted the description, which was furnished by the city engineer of Menominee to counsel, believing it to carry into effect the decision of the court. The bill alleges that the decree as so drawn by counsel was submitted to the court and duly promulgated, and is reported in 272 U. S., 398, and the portion pertinent to this case is as follows:

"Decree announced by Mr. Justice Sutherland:

This cause having been heard and submitted upon certain questions, and the court having considered the same and announced its conclusions in an opinion delivered March 1, 1926 (270 U. S., 295, 70 L. ed., 595, 46 Sup. Ct. Rep., 290).

Now for the purpose of carrying the said opinion into effect, it is ordered, adjudged and decreed:

1. That the boundary between the states of Michigan and Wisconsin along the following course be and it is hereby fixed and finally established as follows: * * * thence down the center of the main channel of the Rivers Brulé and Menominee, to the center of the harbor entrance of said Menominee river, thence in a direct line to the most usual ship channel of Green Bay, passing to the north of Green Island and westerly of Chambers Island and through the Rock Island passage into Lake Michigan, by courses and distances as follows: From a point midway between the outer ends of the Menominee river piers, thence east by south, 7½ miles to the center of the most usual ship channel of the Green Bay, thence along said ship channel north by east one eight east, 8⅞ miles, thence continuing along said ship channel north by east

seven-eighths east, 27 miles thence continuing along said ship channel, east one-fourth north, 10¼ miles, thence east three-fourths north to the boundary between the state of Michigan and the state of Wisconsin in the middle of Lake Michigan. * * * and the land known as 'Sugar island,' being a part of lots 1 and 2, section 11, lot 6 of section 2, and lot 1 of section 3, township 31 north, of range 27 west, of the Michigan Public Survey, is determined to be a part of the mainland of Michigan."

The complainant alleges that the said decree does not carry into effect the decision of the court, in that the line describing the boundary, after leaving the mouth of the Menominee river does not turn to the north and does not pursue a northerly direction to a point opposite the Rock Island passage and through said passage into Lake Michigan, but that said boundary line, after leaving the mouth of the Menominee river, runs east by south seven and one-half miles, fully one-half the distance across Green Bay, and then turns along a line north by east one-eighth east eight and seven-eighths miles, and then follows a line far to the north and east of the line described in the decision.

Complainant further alleges that the land known as Sugar Island, which was determined by the decree to be a part of the mainland of Michigan, was incorrectly described in the decree and that the description covers part of so-called Grassy Island.

Complainant alleges that said errors in the decree were the result of mutual mistakes.

Complainant alleges that by said erroneous decree it loses about thirty-five square miles of fishing area which has always been under the jurisdiction of Wisconsin and over which Michigan has never exercised any jurisdiction. Complainant prays that the alleged erroneous portion of the decree may be stricken; that a true description as claimed by complainant be inserted; and for general equitable relief.

To the bill of complaint the defendant filed answer on December 27, 1932, in which the defendant admits the allega-

tions of the bill respecting the submission of a form of decree and objections thereto, and alleges that the decree is correct except for a typographical error respecting the boundary in Green Bay, in that the third course is described as north *by* east seven-eighths east, whereas it should be northeast seven-eighths east; and defendant admits also that there was an error in the technical legal description of Sugar Island as embodied in the decree. Defendant avers that in the trial of the former case the effort of both parties was directed to the determination of the most usual ship channel in Green Bay with relation to the islands in said bay, and that the location of the line from the harbor entrance of the Menominee river to the ship channel was under discussion, and that the description as contained in the decree was agreed upon. Defendant alleges that it has had actual jurisdiction over the triangle of water in dispute for many years, and denies that said area was ever under the jurisdiction of Wisconsin. Defendant prays that the decree may be modified and corrected as to the conceded errors, and that otherwise relief be denied to complainant, and that complainant be denied any affirmative relief by reason of the fact that the matters and things set forth in the bill of complaint are *res adjudicata*.

Complainant filed a reply to defendant's answer, and therein alleges that the main contention in the original suit was to ascertain whether the main channel of Green Bay was the so-called "Strawberry channel" or the channel between Chambers island and the Michigan mainland; and denies the affirmative allegations of defendant's answer.

Defendant filed an answer to the affirmative allegations of complainant's reply, denying the same.

Under these issues it is first necessary to determine whether or not complainant can maintain this suit.

AS TO COMPLAINANT'S RIGHT TO MAINTAIN THIS ACTION.

Findings of Fact.

The basis of complainant's contention of a right to maintain this action is: (1) that mutual mistakes were made in the description of the boundary line in the decree in the former case; (2) that said decree was entered by consent and was erroneous; and (3) that the issue now tendered as to the true location of the boundary line in the *waters* of Green Bay either under a claim of possession or under the Congressional Acts was not adjudicated in the original case.

(1) As to Mutual Mistakes in Former Decree.

I find that after the opinion of the court had been promulgated in the former case, counsel for the respective parties met in the city of Washington and had a conference with Mr. Justice Sutherland, the author of the opinion, and were directed by him to formulate a decree in harmony with said opinion. This counsel undertook to do.

It was obvious that the line must be drawn west of Chambers Island in order to give said island to Wisconsin, to which state the court found said island belonged by dominion and possession. In drafting the decree as to the boundary line in Green Bay, a line was drawn easterly from the mouth of the Menominee river seven and one-half miles, perpendicular to a sailing course as shown on a modern sailing chart, and the attempt was made to follow said sailing course as charted, west of Chambers Island and through the Rock Island passage into Lake Michigan. I find that the description in the decree as to this portion of the boundary line was furnished at the conference in good faith by counsel for Michigan, who was familiar with local conditions and nautical terms, as conforming to the opinion of the court, and was accepted by counsel for Wisconsin, who was not familiar with nautical terms or local conditions, as so complying, and that said decree was approved by

the court because consented to by counsel for both parties as being in accord with the opinion of the court.

The accompanying map will assist in an understanding of the question here presented. It is a copy of an exhibit in the case. On this map three lines appear, which are colored, respectively, black, blue and red. The black line, A. H. O. K. J. X., is substantially the boundary line of the decree in the former case. The red line, A. H. O. Q. S. R., is the line now claimed by Michigan. The blue line, A. B. C. D. E. F. G., is the boundary line now contended for by Wisconsin. It will be observed that there is a triangle formed by the lines A. H., A. O., and H. O., which is the important water area involved in this law suit. This area is opposite the city of Menominee in Michigan, and the city of Marinette in Wisconsin, which cities are on opposite sides of the Menominee river at its mouth. This is a very important and valuable area for commercial fishing. It is apparent that it is important to the fishing industry to determine definitely to which state this area belongs, as questions of licenses to fish therein, patrolling, and other matters, are involved. The line A. M. N. P. on the map is substantially the line contended for by Michigan in the former suit. In a general way, this line indicates the "Strawberry island passage." The island to the east of the letter O on the map, at the tip of the triangle, is Chambers Island, which the court gave to Wisconsin. It is now conceded by both parties that the boundary line must pass to the west of Chambers Island, under the decision in the former case.

Upon its own theory regarding the location of the boundary line, Michigan concedes that there are at least two errors in the description contained in the decree. As before stated, the description embodied in the decree was substantially a line east from the mouth of the Menominee river, seven and one-half miles perpendicular to the sailing course shown on modern charts passing west of Chambers Island, and, as drawn in the decree, it was supposed to follow said sailing course through the Rock Island passage into Lake Michigan.

The description in the decree is as follows:

"* * * to the center of the harbor entrance of ... Menominee river, thence in a direct line to the most ... ship channel of Green Bay, passing to the north of Gr... Island and westerly of Chambers Island and through ... Rock Island passage into Lake Michigan, by courses ... distances as follows: From a point midway between ... outer ends of the Menominee river piers, thence east ... south, 7½ miles to the center of the most usual ship ch... nel of the Green Bay, thence along said ship channel n... by east one-eighth east, 8⅞ miles, thence continuing ... said ship channel north by east seven-eighths east, ... miles, thence continuing along said ship channel, ... one-fourth north, 10¼ miles, thence east three-four... north to the boundary between the state of Michigan ... the state of Wisconsin in the middle of Lake Michig...

Michigan now concedes that the distance from the cen... of the harbor entrance of the Menominee river in a perp... dicular line to the center of said sailing course is seven ... one-eighth miles instead of seven and one-half miles as st... in the decree.

In the decree the third course of the boundary is descri... as follows: "* * * thence continuing along said ship cha... north *by* east seven-eighths east 27 miles * * *." The ... discloses the effect of the insertion of the word "by" in ... description of this course. As written in the decree, the ... would follow substantially the black line A. H. O. K. J. X. ... the map. This would be in conflict with the opinion of ... court under any possible construction, and would give isl... that belong to Michigan, and even a part of the Michi... mainland, to Wisconsin. There can be no question but ... this discription is erroneous, and that the word "by" sho... in any event, be eliminated from the decree.

The conclusion is inevitable that mutual mistakes w... made in the decree and that it is absolutely essential that ... decree be opened up and the necessary corrections be m... to carry out the purpose and intent of the court as expre... in the opinion.

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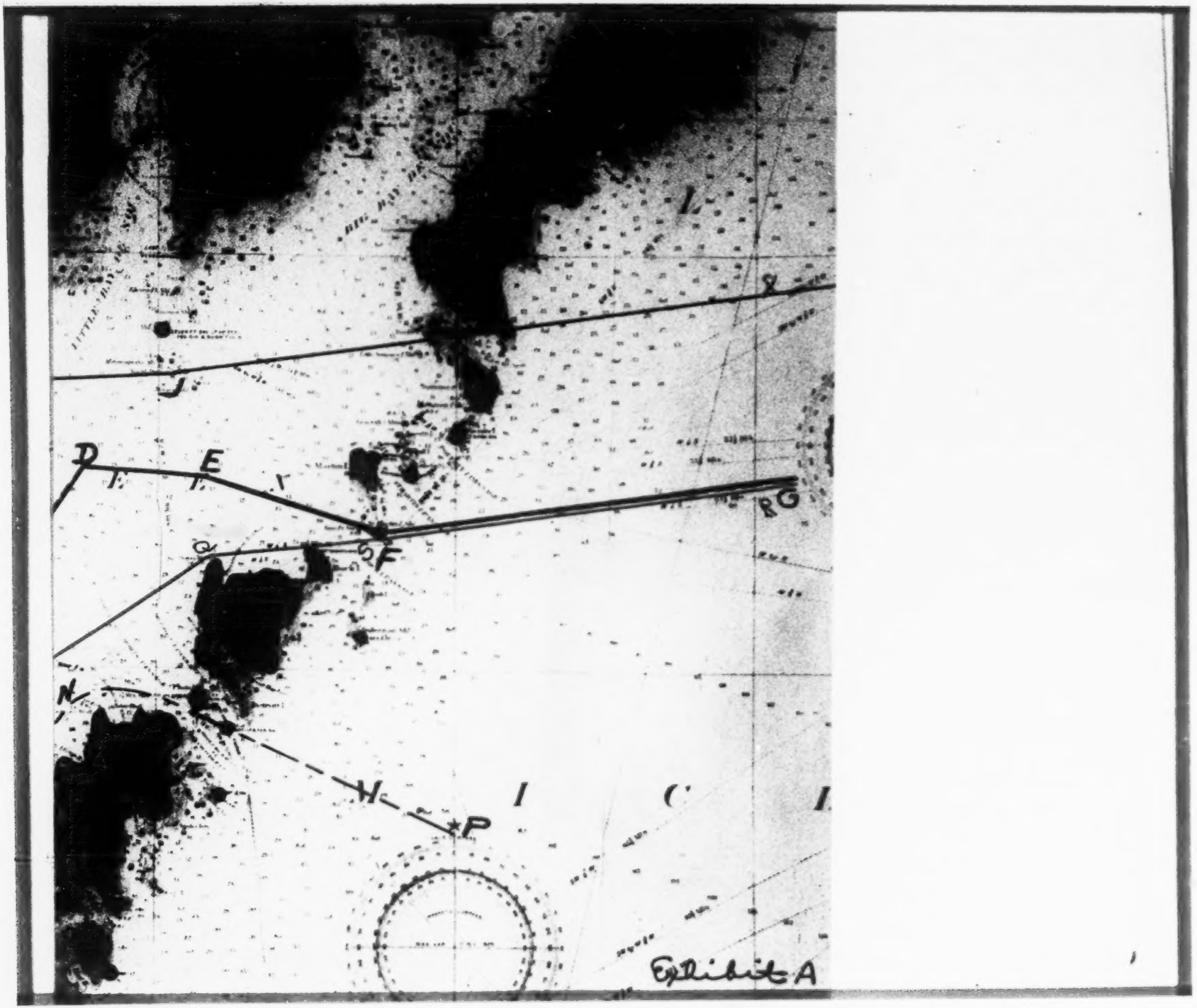
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Exhibit A

(2) As to Consent to Former Decree.

I find that not only does the decree in the former case contain mutual mistakes, but also that it was entered by consent of the parties under the mistaken belief that it complied with the opinion of the court. There is no conflict in the record on this question. Counsel for the parties consented to the decree in the form in which it was drawn, and the court adopted it because of such consent of counsel.

(3) As to the Issue of the True Location of the Line in Green Bay now Presented.

I find that the issue now tendered as to the true location of the boundary line, in the *waters* of Green Bay as distinguished from the islands therein, was not directly involved in the former suit; that no evidence was offered in that case on the question of jurisdiction over said waters except incidentally, and that the court made no definite pronouncement in relation thereto in its opinion.

Conclusions of Law as to Complainant's Right to Maintain this Action.

(1) Finding, as I do, that mutual mistakes were made in drafting the decree in the former case, I conclude as a matter of law that the complainant has the right to have the same corrected in this court and in this proceeding. It is one of the well-recognized powers of a court of equity to grant relief against a judgment or decree that has been rendered by mistake. In this case the suit is between the same parties and in the same court and the attack is direct. See, *Brown* v. *County of Buena Vista*, 95 U. S., 157; *Rhode Island* v. *Massachusetts*, 15 Pet., 233; *Metcalf* v. *Williams*, 104 U. S., 93.

(2) Also, the decree being a consent decree and being erroneous, as I find it to be, it may properly be corrected in this action. Counsel for defendant frankly concedes in his brief that "an erroneous decree resulting from consent of the parties is not *res adjudicata*." Such is the law. As bearing on the question, see *Lawrence Mfg. Co.* v. *Janesville Mills*, 138

U. S., 552; *Gay* v. *Parport*, 106 U. S., 679; *Utah Power & Light Co.* v. *United States*, 42 Fed. (2d), 304, 308.

(3) I also conclude as a matter of law that, inasmuch as the issue of dominion over the *water* area in Green Bay, as distinguished from the *islands* therein, was not directly in issue in the former suit, that as no evidence was offered in the former case upon that question and no definite pronouncement made by the court, complainant is not barred from prosecuting this action to have the true location of the portion of said boundary involved in this case now determined. *Hopkins* v. *Lee*, 8 Wheat., 109; *Iowa* v. *Illinois*, 151 U. S., 238; *Oklahoma* v. *Texas*, 256 U. S., 70; *Virginia* v. *Tennessee*, 148 U. S., 503; *Indiana* v. *Kentucky*, 136 U. S., 479; *Missouri* v. *Kentucky*, 11 Wall., 395; *Rhode Island* v. *Massachusetts*, 4 How., 591; *Louisiana* v. *Mississippi*, 202 U. S., 1.

Reaching the conclusion that complainant may now prosecute this action, I proceed to report upon my findings of fact, conclusions of law, and recommendations on the main questions involved in the case at bar. On final analysis, four questions are presented: (1) Has a definite boundary line in said waters of Green Bay been established by *dominion and acquiescence* therein; and (2) if a boundary line has not been so established, then where is said boundary line to be located under the terms of the Acts of Congress; (3) which state is entitled to Grassy Island and (4) which state is entitled to Sugar Island?

AS TO THE LOCATION OF THE BOUNDARY LINE BY DOMINION AND ACQUIESCENCE.

Findings of Fact.

Both complainant and defendant claim the right to the disputed area by possession and acquiescence. A very large amount of evidence was introduced on this branch of the case. Some eighty or more witnesses were examined, quite evenly divided between the two parties as to numbers. A majority

of the witnesses were fishermen. In a general way, the Wisconsin fishermen contended that the disputed area had been long occupied by fishermen from that state; the Michigan fishermen contended that they and their colleagues have had possession of the area for a long time. Much evidence was offered as to the location of a "generally accepted and reputed boundary line" in the waters of Green Bay. Of necessity, the evidence as to the location of such a line in the open waters of a bay approximately seventy miles long and twenty miles wide was very uncertain and indefinite. In the opinion in the former case this court aptly said:

> "Living witnesses are no longer available; and tradition, recollection of statements made by persons long since dead,—if of any legitimate value,—deductions drawn from ancient documents, more or less cryptic, and inferences based on more recent uses of the channels or on their relative safety and convenience as indicated by physical characteristics, all relied upon in the absence of first-hand evidence, constitute at best most unsatisfactory substitutes."

The same is true of the evidence in the instant case. Obviously, fishermen were not overly zealous to be exact and punctilious in keeping their nets upon the proper side of an unmarked and imaginary boundary line in the wide and open waters of Green Bay. Their testimony as to where tradition had placed the boundary line in such waters is, of necessity, unsatisfactory in establishing a definite and certain line. I find that both Wisconsin and Michigan fishermen plied their occupations in the triangular disputed area, and, quite generally, in the waters of Green Bay. I can not find in the record such long-continued and exclusive possession of the disputed area, by either state or its citizens, as would constitute the exercise of dominion over the area by one state to the exclusion of the citizens of the other state and acquiescence in such possession. The situation is very different from the one respecting the *islands* of Green Bay that were involved in the

former suit, where, by act of the legislature of Wisconsin, certain islands had been organized into a municipality and the state of Wisconsin had exercised sovereignty over them for many years. In the instant case there is some slight evidence of the patrolling of a portion of Green Bay by Michigan game wardens, but no such exclusive, open, and hostile exercise of dominion over the disputed area as would establish title. I do not deem it essential to incorporate in this report an extensive review of the testimony of the eighty or more witnesses as to where they fished, or with what traditions they were familiar as to the location of the reputed boundary line in the waters of Green Bay. I heard the evidence in open court, and spent a considerable amount of time inspecting the *locus in quo*, accompanied by counsel for both parties. I have since read the transcript of the evidence with care, and I think that but one conclusion can be reached on this branch of the case, and that is, that neither state has exercised such exclusive dominion over the waters now in dispute, and particularly over the triangular area in question, as to establish any certain or definite line as a boundary by possession and acquiescence. In a general way, the Michigan fishermen fished in the waters adjacent to the Michigan mainland, and the Wisconsin fishermen carried on their occupation in the waters near the Wisconsin mainland and the islands in that vicinity; but I find no sufficient evidence of any well-defined or recognized boundary line in the open waters of Green Bay, west and south of Chambers Island and particularly in the triangular area, that it could be said is established by dominion and acquiescence. I find that the state of Wisconsin required residents of that state to procure licenses to fish in its waters in 1907, and required licenses of nonresidents in 1909; and the state of Michigan required licenses of both residents and nonresidents in 1907. I find that many of the fishermen from both states secured licenses from each of said states, which, of itself, is some indication of uncertainty on their part as to the location of the boundary line.

Many exhibits were offered in evidence, including maps, both ancient and modern, official and unofficial. Expert evidence was offered respecting the true interpretation of the maps, and other matters. There was evidence of an action involving the replevin of nets that had been seized by a warden, and in which case the location of the nets as to the boundary line was involved. Under the record, I do not find the decision in the case referred to, at all determinative of the question involved herein.

Great diligence has been exercised by counsel for both parties in bringing into the record all evidence available on the question before the court. To attempt an analysis and review of the large record in the case would unduly extend this report. I find that the record fails to disclose that any certain, definite, and ascertainable boundary line has been established in the waters in controversy by the exercise of exclusive dominion over the same by either of said states.

Conclusions of Law on Question of Dominion and Acquiescence.

In the opinion in the former case this court said:

"That rights of the character here claimed may be acquired on the one hand and lost on the other by open, long-continued, and uninterrupted possession of territory, is a doctrine not confined to individuals, but applicable to sovereign nations as well, *Direct United States Cable Co.* v. *Anglo-American Teleg. Co.*, (1877) L. R. 2 App. Cas., 394, 421; Wheaton, Int. Law, 5th Eng. ed., 268, 269; 1 Moore, Int. Law Dig., 294 *et seq.*, and, *a fortiori* to the quasi sovereign states of the Union. The rule, long settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority. *Indiana* v. *Kentucky*, 136 U. S., 479, 509 *et seq.*, 34 L. ed., 329, 332, 10 Sup. Ct. Rep., 1051; *Virginia* v. *Tennessee*, 148 U. S., 503, 522-524, 37 L. ed., 537, 544, 545, 13 Sup. Ct. Rep., 728; *Louisiana* v. *Mississippi*, 202 U. S., 1, 53, 50 L. ed.,

913, 932, 26 Sup. Ct. Rep., 408, 571; *Maryland* v. *West Virginia*, 217 U. S., 1, 40-44, 54 L. ed., 645, 657-659, 30 Sup. Ct. Rep., 268; *Rhode Island* v. *Massachusetts*, 4 How, 591, 639, 11 L. ed., 1116, 1137; *Missouri* v. *Iowa*, 7 How., 660, 677, 12 L. ed., 861, 868; *New Mexico* v. *Colorado*, 267 U. S., 30, 40, 41, 69 L. ed., 499, 502, 503, 45 Sup. Ct. Rep., 202. That rule is applicable here and is decisive of the question in respect of the Montreal river section of the boundary in favor of Wisconsin."

The converse of this rule is also the law.

I conclude that neither state has shown such an open, long-continued, uninterrupted, and peaceable possession of the disputed area and the exercise of sovereignty and dominion over it as to establish any definite line as the true boundary line in Green Bay.

AS TO THE LOCATION OF THE BOUNDARY LINE UNDER THE ACTS OF CONGRESS.

Findings of Fact.

The territory of Wisconsin was created by an Act of Congress of April 20, 1836 (chap. 54, 5 Stat. at L., 10, 11). The boundary of Wisconsin, as fixed by said Act, in so far as involved in this suit, provides: "* * * to a point in the middle of said lake (Michigan) and opposite the main channel of Green Bay and through said channel and Green Bay to the mouth of the Menominee river." By the Enabling Act of June 15, 1836 (chap. 99, 5 Stat. at L., 49), under which Michigan became a state on January 26, 1837 (chap. 6, 5 Stat. at L., 144), the boundary in Green Bay was in the reverse direction from the description in the Wisconsin Territorial Act, and was as follows: "* * * thence down the center of the main channel of the same (Menominee river) to the center of the most usual ship channel of the Green Bay of Lake Michigan; thence through the center of the most usual ship channel of the said bay to the middle of Lake Michigan."

Both parties assume that these two descriptions must, of necessity, be construed to be identical. Also both parties assume that the descriptions refer to a channel in the main body of Green Bay. Construing the two Enabling Acts together, the difficult question arises as to the true location of the boundary line under the descriptions in said acts. No evidence of living witnesses is available as to where "the center of the most usual ship channel" or the "main channel" of Green Bay was in 1836. I find that there was no such thing as a charted sailing course, or any well-recognized or defined ship channel in the waters of Green Bay in 1836. The ships of that day that traversed Green Bay were almost entirely sailing vessels of light draft, and, except for avoiding islands, shoals, and reefs, they traversed the waters of Green Bay in the most direct and convenient way in which to reach their destinations, without being limited to any defined channel.

Many ancient maps were introduced in evidence. They were interpreted by a map expert. They were not drawn to scale; they were mostly what might properly be termed "sketch maps" of explorers or engineers. Some are apparently inaccurate as to the location of islands and channels. Slight, if any, dependence can be placed upon them as showing any "most usual ship channel" extending lengthwise in Green Bay in or about 1836.

In 1840 one Captain Cram was sent by the War Department to make a survey of the boundary line in question. The portion of his report pertinent to the Green Bay section is as follows:

> "After descending the channel of the Menomonee 'to the centre of the most usual ship-channel of the Green bay of Lake Michigan,' the boundary is made to run 'thence through the centre of the most usual ship-channel of Green bay, to the middle of Lake Michigan.'
>
> From map No. 4, which accompanies this report, it may be inferred that the islands which are in the eastern part of Green bay would cause several ship channels. It is a well known fact to all who have any personal knowl-

edge of the navigation of this bay, that there are at least two ship-channels, which are in use by all classes and kinds of craft that navigate the great lakes. It would be next to an impossibility to collect the testimony that would be required to decide the question, which of these is the 'most usual ship-channel of Green bay.' And it is not easy to conceive any other mode (than by testimony) by which the 'most usual ship-channel could be ascertained. But suppose this method of collecting testimony practical: it might occur that all the evidence that could be obtained on the subject would prove that one of these channels is just as much in use as the other; in which case, it would only be shown that there is no such thing as the 'most usual ship-channel' in this part of the bay.

Although the term 'most usual ship-channel' is used in the description of the boundary, still it is rather to be presumed that this term was intended to imply in the act of Congress the best ship-channel of all that may be found in that portion of Green bay referred to. An equitable construction of the law would convey this idea; for, it is not to be presumed that, of two States bordering upon navigable ship-channels, either State would or could, in equity, claim to appropriate the best of these channels exclusively to herself.

If the interpretation of the term 'most usual ship-channel,' implying the best ship-channel, be correct, it will be necessary to make a complete hydrographic survey of all the channels that exist in that portion of Green bay east of the mouth of the Menomonee river, in order to discover the best ship-channel (if there be such) among all the ship-channels now in use in that part of the bay.

After this survey shall have been made, the particular channel along which the boundary shall run may be declared."

This engineer obviously found it impossible to locate "the center of the most usual ship channel of Green Bay" in the body of the bay. He evidently construed the description to refer to a ship channel running lengthwise of Green Bay and to mean the "best ship channel" rather than "the most usual" one. On his map he showed two ship channels running

lengthwise of Green Bay, one west of Chambers island and one between Chambers island and the Door peninsula. Captain Cram's report as to this section of the boundary line is so indefinite and inconclusive that it is not a certain aid in determining the proper location of the boundary line in the waters of Green Bay in 1840. It is unfortunate that the engineer sent for the very purpose of locating "the most usual ship channel of Green Bay" in 1840, reported that he was unable to do so; and this rather adds to the difficulty of now locating such a channel, instead of clarifying it.

I find as a fact that practically this entire body of water is one wide channel. This whole area outside the shoal water near the shore lines was traversed by ships in 1836. Having studied the maps and all testimony and records in evidence, which undoubtedly include all that are available, I find as a fact that there was no such thing as a "main channel" or a "most usual ship channel" in the body of Green Bay at the time of the adoption of said Acts of Congress. Ships came and went between Green Bay and Lake Michigan. They entered and left the mouth of the Menominee river. They went to and fro east of Chambers Island and west of Chambers Island. They sometimes followed the "Strawberry island passage" near the Door peninsula. They traveled from Lake Michigan to the city of Green Bay, at the head of the bay, and in so doing passed east of the mouth of the Menominee river. I repeat, I cannot find from any competent evidence that in 1836 there was any ship channel in the body of Green Bay that could properly be said to be the "most usual ship channel" or the "main channel" of said bay.

In the former case the court has established the right of Wisconsin to Chambers Island, and, of necessity, the waters between it and the mainland of the Door peninsula would belong to Wisconsin; so that we may eliminate the "Strawberry island passage" from our consideration and confine our inquiry to ascertaining the location of the "most usual ship channel" in the portion of Green Bay lying west of Chambers Island.

But this does not remove the difficulty, for, limiting our inquiry to this portion of Green Bay, we still find that there is no evidence whatever available upon which one could place a finding of any certain location of a "most usual ship channel" in this portion of Green Bay in 1836.

I therefore find that if, as a fact, there did exist in 1836 any such thing as the "most usual ship channel" in the body of Green Bay, its true location can not now be ascertained and the same can not now be definitely established.

Conclusions of Law on Contentions of the Parties as to Location of Boundary Line Under Congressional Acts.

Finding as I do, that the entire body of water constituting the portion of Green Bay lying west of Chambers Island was one "main" or "most usual" channel at the time of the Congressional Acts, where shall the boundary line be drawn in such body of water?

The description "middle of main channel" is not infrequently used in boundary descriptions, but in most instances it has been possible to locate it as a physical fact. This description occurs most frequently where a river is a boundary. This court discussed the phrase "center of the main channel," as applied to the Menominee river, in the opinion in the main case. The court said:

> "Captain Cram's first report to Congress, dated December, 1840, points out the impracticability of following the center of the main channel of the river:
>
> 'The "center" of the main channel of the Menominee river is made a part of the boundary. The river contains numerous islands, and consequently more than one channel, where these islands occur. It will be impossible in many of these cases to know which is the "main channel" without minute surveys. In many cases it was tried and found impossible to decide by a simple inspection or reconnaissance which was the "main channel". It should also be remarked here that the term "main channel" ap-

plied to the multiplicity of channels of the Menominee, would be somewhat ambiguous in any event—for, it may be asked—Is the main channel the widest channel of the river? Or is it the deepest? If it is the widest or deepst now, will it be the widest or deepest hereafter? Or shall the main channel be that through which the greater quantity of water shall be found to pass at the time of the survey? And if it should occur that two channels at the same island pass equal quantities of water—which would then be regarded as the boundary? These questions are sufficient to show the indefiniteness of the term "main channel"—There are also a few islands in the Brulé river to which similar questions might apply in reference to the term "main channel".'"

In *Iowa* v. *Illinois*, 147 U. S., 1, this court considered the boundary line between the states of Iowa and Illinois, where the Mississippi river was involved. The court said:

> "When a navigable river constitutes the boundary between two independent states, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each state in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It is, therefore, laid down in all the recognized treatises on international law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining states up to which each state will on its side exercise jurisdiction."

Again the court said:

> "* * * we are of opinion that the controlling consideration in this matter is that which preserves to each state equality in the right of navigation in the river. We therefore hold, in accordance with this view, that the true line in navigable rivers between the states of the Union which separates the jurisdiction of one from the other is the middle of the main channel of the river. Thus the jurisdiction of each state extends to the thread of the

stream, that is, to the 'mid-channel,' and, if there be several channels, to the middle of the principal one, or, rather, the one usually followed."

In *Louisiana* v. *Mississippi*, 202 U. S., 1, this court said:

"But we are of opinion that, on occasion, the principle of the thalweg is applicable, in respect of water boundaries, to sounds, bays, straits, gulfs, estuaries, and other arms of the sea.

As to boundary lakes and landlocked seas, where there is no necessary track of navigation, the line of demarcation is drawn in the middle, and this is true of narrow straits separating the lands of two different states; but whenever there is a deep-water sailing channel therein, it is thought by the publicists that the rule of the thalweg applies. 1 Martens (F. de) 2d ed. p. 134; Hall, sec. 38; Bluntschli, 5th ed., secs. 298, 299; 1 Oppenheim, pp. 254, 255."

In *Minnesota* v. *Wisconsin*, 252 U. S., 273, the court said:

"Manifestly, from the description heretofore given, the waters between Big island and Lake Superior were broad sheets without any definite uninterrupted deep channel extending throughout their entire length. Also, there was no steady, controlling current. Such vessels as plied there in 1846 and long thereafter moved with freedom in different directions. The evidence convinces us that as navigation gradually increased prior to 1890, the northerly course in Upper St. Louis bay commonly followed by vessels going to or coming from points above Big island was not along the narrow curving channel skirting Grassy point, but over the shorter one near the middle of the bay."

The court further said:

"The doctrine of thalweg, a modification of the more ancient principle which required equal division of territory, was adopted in order to preserve to each state equality of right in the beneficial use of the stream as a means of communication. Accordingly, the middle of the principal channel of navigation is commonly accepted as the boundary. Equality in the beneficial use often would be

> defeated, rather than promoted, by fixing the boundary on a given line merely because it connects points of greatest depth. Deepest water and the principal navigable channel are not necessarily the same. The rule has direct reference to actual or probable use in the ordinary course and common experience shows that vessels do not follow a narrow crooked channel close to shore, however deep, when they can proceed on a safer and more direct one with sufficient water."

It certainly is proper to assume that Congress intended to treat the states of Michigan and Wisconsin equitably in the use of a portion of the navigable waters of Green Bay. The line passing "down the center of the most usual ship channel" would give the states equal rights in the use of said channel.

Equality between the states in a portion of Green Bay was evidently the dominant purposes of Congress. This being so, and the actual channel being unascertainable, I reach the conclusion that, under the law, in this landlocked bay, the geographical center of that portion of the bay involved would be the proper boundary. The portion of Green Bay involved is only that portion lying north of the mouth of the Menominee river, west of Chambers Island and south of a line drawn due west from the center of the Rock Island passage to the Michigan mainland. Roughly speaking, the boundary would follow the line A. B. C. on the map, and thence in a generally northward course in the center of that portion of the bay until it would intersect a line extended from the point Q on the map to the Michigan mainland, and thence eastward through the center of the Rock Island passage to the center of Lake Michigan. Wisconsin has no claim to any of the portion of Green Bay lying north of the last-mentioned line. Its rights are solely in the portion of Green Bay north of the mouth of the Menominee river, west of Chambers Island, and south of an extended line passing through the center of the Rock Island passage.

My own conclusion differs entirely from the contention of either of the parties. Both parties assume that the Enabling

Acts, in making reference to "the most usual ship channel of Green Bay," or "the main channel of Green Bay," intended a channel extending north and south lengthwise of Green Bay, and the foregoing findings of fact and conclusions of law are based on such assumption. I deem this assumption to be erroneous, as I shall undertake to demonstrate in the next division of this report.

Master's Construction of Congressional Acts.

In so far as it was involved in the former case, it seems to have been assumed by both parties that the description in the two Congressional Acts referred to a channel ("main channel" or "most usual ship channel") of Green Bay that extended lengthwise north and south. The court properly accepted this assumption, and said:

> "The evidence as to which of the two ship channels was the usual one at the time of the adoption of the Michigan Enabling Act is not only conflicting, but of such inconclusive character that, standing alone, we could base no decree upon it with any feeling of certainty. Living witnesses are no longer available; and tradition, recollection of statements made by persons long since dead,—if of any legitimate value,—deductions drawn from ancient documents, more or less cryptic, and inferences based on more recent uses of the channels or on their relative safety and convenience as indicated by physical characteristics, all relied upon in the absence of first-hand evidence, constitute at best most unsatisfactory substitutes. If it were necessary, we should, of course, undertake the task —as we should be bound to do—of reaching a conclusion from these dubious premises. But, it is not necessary, for, as in the case of the two sections of the boundary just discussed, the title of Wisconsin to the disputed area now in question is established by long possession and acquiescence; and this conclusion is justified by evidence and concessions of the most substantial character."

Counsel for both parties in the instant case again assume that the "channel" referred to in the Enabling Acts must be a channel extending lengthwise of Green Bay north and south.

Notwithstanding this assumption of counsel for both parties, I can not accept the premise as correct and undertake to apply the description of the Congressional Acts in such a manner, and I deem it my duty to make my own findings on the record before me, even though they may not coincide with the assumptions of counsel for both parties. The action is one praying for the true location of a boundary line. In an action of this character it is the duty of the court to establish the *true* boundary line, if possible, irrespective of the assumptions or claims that may be made by the parties.

Our polestar in this proceedings is the intent of Congress as expressed in the acts of 1836. Of necessity, we must view the situation in the light of the then-known facts in regard to the subject with which Congress was dealing. Assuming that Congress had all the evidence then available before it, it would have had *no* evidence whatever of "sailing courses," or soundings in Green Bay as now known. It was dealing with two bodies of wide and open water, namely, Lake Michigan and Green Bay. Both were practically uncharted. Congress merely undertook to draw a boundary line from "a point in the middle of Lake Michigan" to the mouth of the Menominee river, or, in the reverse order, from the mouth of the Menominee river into Lake Michigan.

What was the situation before Congress in 1836? There were two wide, unobstructed, and open bodies of water, traversed largely by sailing vessels that, traveling no certain courses, were compelled to "tack" as the wind required. The mouth of the Menominee river was fixed as one end of the boundary line, and "a point" in the middle of Lake Michigan was the other. Where should this line be drawn? With the somewhat crude and scientifically inaccurate maps of that day available to it, Congress found these two large bodies of water separated from each other by a series of islands running north and south between the northern end of the Door peninsula and the Michigan mainland. Through this group of islands there were at least five "passages" or channels. A

glance at the map will disclose the situation as it must have been apparent to the Congress, even with the limited information available in 1836. Among these islands and leading from the one large body of water to the other, were the Porte des Morts (Death's Door) passage, Detroit passage, Rock Island passage, St. Martin's passage, and Poverty Island passage.

I think it significant that the Wisconsin Territorial Act was first passed. In the Wisconsin Act the line was drawn "through the middle of Lake Michigan *to a point in the middle of said lake and opposite the main channel of Green Bay.*" This was the first course. In a practical way the line was described as if one were following a course and passing northward through the middle of Lake Michigan. This course stops in the middle of Lake Michigan "opposite the main channel of Green Bay." If the Congress had in mind "*a main channel* of Green Bay" that ran north and south lengthwise of Green Bay, some seventy or more miles, where would the "point" opposite *such* a "main channel" be? Such a description so applied would be an absurdity. Who could locate such "a point"? It is an impossibility. If, however, we construe the words "main channel" as I think Congress must have understood and intended to use them, in the light of the physical conditions and the information then possessed by Congress, we have no difficulty whatsoever. Congress located "a point" in the middle of Lake Michigan and fixed that point opposite "the main channel of Green Bay." Then continuing the line from the "point in the middle of Lake Michigan and opposite the main channel of Green Bay" it passed "*through said channel*" into Green Bay proper.

What was this "main channel" through which the line passed? It could not, in my judgment, be other than the *main* one of the channels that existed between Lake Michigan and Green Bay. Which one of the channels between these islands was the "main" or "most usual" channel could be readily ascertained by scientific and factual investigation. The Congress used a common and ordinary term used in boundaries. "The

main channel" of a river is a most common term in boundary descriptions. Whichever one of these island channels was *"the main channel"* of Green Bay was the one opposite which the *"point"* in Lake Michigan was fixed. Then the line proceeds from this "point" *"through said channel and* Green Bay to the mouth of the Menominee river." Nothing whatever is said about a channel to be followed *in* Green Bay after the line passed through the channel opposite the point in Lake Michigan.

If the description was intended to mean that the course must be through the main channel of the *body* of Green Bay to the mouth of the Menominee River, there was no need whatever of inserting the words "and Green Bay." Note the language: "through the middle of Lake Michigan *to a point* opposite the main channel of Green Bay and through said channel *and Green Bay* to the mouth of the Menominee river." (Italics mine.)

I can not escape the conclusion that Congress never meant to refer to a "main channel" in the *body* of Green Bay, by the language of the Wisconsin Act.

Some few months later Congress passed the Michigan Act, obviously with full knowledge of the Wisconsin Act. If the Wisconsin Act is construed as I have suggested, it not only is plain but also is wholly consistent with the Michigan Act. The description in the Michigan Act is in the reverse, and is: "down the center of the main channel of the same (Menominee river) to the center of the most usual ship channel of the Green Bay, thence *through* the center of the most usual ship channel of said bay to the middle of Lake Michigan."

Congress must have meant the descriptions to be identical in effect. They can be so reconciled. The whole difficulty lies in the term "to the center of the most usual ship channel of the Green Bay." The problem becomes simple when we consider that the Wisconsin Act was passed first and that the "main channel" therein referred to is the *main* one of the several channels leading from Lake Michigan into Green Bay.

This being the "main channel" referred to in the Wisconsin Act, applying the language of the Michigan Act passed later, the course of the boundary under the Michigan Act is from the mouth of the Menominee river "*to* the center" of *this* "main" or "most usual" channel leading from Green Bay into Lake Michigan, then "through the center" of said ship channel "to the middle of Lake Michigan,"—in other words, to the "point" in Lake Michigan opposite said channel, as described in the Wisconsin Act. Neither act attempted to describe any channel in the body of Green Bay between the mouth of the Menominee river and the "main channel" between the islands. In the Wisconsin Act, once the line passes through the main island channel it then goes through Green Bay to the mouth of the Menominee river. By reverse description the line goes from the mouth of the Menominee river to this "most usual" or "main" channel (among the islands), and through it to the point in the middle of Lake Michigan. I can not believe that Congress ever contemplated by these descriptions that the line should run directly east from the mouth of the Menominee river some seven and one-eighth miles to a modern sailing course and then turn practically at a right angle and proceed north as shown by the red line on the map. I think it apparent that Congress, with the information then before it, intended to draw a boundary line from a point in the middle of Lake Michigan opposite the main or most usual island channel leading into Green Bay, through the center of such channel into Green Bay, and thence by the most direct and navigable route to the mouth of the Menominee river. Such a line is consistent with the description in both acts; it is consistent with the known conditions as to the island channels; it is consistent with the fact that ships then sailed the waters of Green Bay generally and did not follow any definite channel or course therein.

To attempt to construe these Acts otherwise leaves an impossible description of a "point" opposite a "main channel" some seventy miles in length, and also calls for the location of a

"main" or "most usual ship channel" in Green Bay, where the whole expanse of water was one "main" or "most usual ship channel," traversed indiscriminately by the boats of that day.

There is some corroborative evidence in the record which supports the construction of the language of the Enabling Acts which I have suggested.

One Lucius Lyon was a former delegate from the territory of Michigan. It appears that he was in Washington in 1836, and, as senator-elect from the prospective state, was interested in the proceedings for the admission of Michigan into the Union. He wrote letters to his constituents in Michigan, excerpts from which are in the record. On February 21, 1836, he wrote to one Andrew Mack, of Detroit:

> "I have no doubt the committee will recommend our western boundary be so altered as to run down Lake Michigan to the Fox Islands, thence along the main ship channel *into* Green Bay and up the bay to the mouth of the Menominee river."

On the same date he wrote to Chas. C. Hascall, a member of the Michigan senate:

> "I believe the committees of both houses will be willing to propose to the legislature to assent to an alteration of our western boundary so that it may run from the northwest corner of the state of Indiana down Lake Michigan to the most western extremity of the most westerly of the Fox Islands, *thence through the middle of the main ship channel into Green Bay, thence through the bay to the mouth of the Menominee river.*" (Italics mine.)

These letters, written by a party vitally interested in the subject and with full knowledge of the situation, certainly are illuminating as to what was before Congress and what was its intent and understanding. Exactly what Lyon anticipated at the time is what Congress in fact did shortly thereafter.

No one can misunderstand where Lyon thought the line would run. It would go northward in Lake Michigan to the

Fox islands. This would be practically opposite the channels leading into Green Bay. Congress did not run the line to the Fox islands, but instead down the middle of Lake Michigan to "a point" opposite the main channel into Green Bay. This was substantially the course that Lyon predicted. Then, exactly as Lyon anticipated, it went "*along the main ship channel into Green Bay and up the bay to the mouth of the Menominee river.*" I think there can be no doubt whatever that Lyon, on the ground at the time and investigating the situation before Congress, clearly understood that the "main channel" he was referring to was the main channel between the islands leading from Lake Michigan into Green Bay. I think Congress understood the situation exactly as did Lyon.

I am convinced from the language of the two Acts, and all the surrounding facts and circumstances, that Congress, in using the expressions "main channel" and "most usual ship channel," meant to refer to the main one of the channels between the islands that separate Green Bay and Lake Michigan, and not to a channel in the open body of Green Bay. Under the record there is no difficulty in locating such a channel as being the Rock Island passage.

Recommendations as to Green Bay Section.

I am conscious of the fact that, in view of my findings of fact, my recommendations for a decree as to the Green Bay section must be in the alternative. I can not avoid this. This I regret.

I therefore submit the following recommendations: (1) If the court accepts the Master's conclusion to the general effect that the channel referred to in the Acts of Congress is one between the islands that separate Green Bay and Lake Michigan, then the boundary line should be drawn from "a point in the middle of Lake Michigan opposite the center of the Rock Island passage, thence in a general westerly direction through the center of said passage, and thence in a course capable of

navigation by the most direct route to the mouth of the Menominee river. It would follow the red line on the map (R S Q) to the objective off Boyer's Bluff (marked by the letter Q), and thence in a direct line to a point approximately two miles west of the Chambers island light (the red line from Q to O on the map), and thence in a direct line approximately eleven miles to the center of the mouth of the Menominee river. The exact technical description of the line I have indicated is easily ascertainable, and can be correctly embodied in a decree. Such decree I recommend.

(2) If, however, I am in error in my construction of the Congressional Acts as applied to the situation, and the court holds, as counsel for both parties assume, that the terms "most usual ship channel" or "main channel" refer to a channel in the body of Green Bay proper, west of Chambers Island, then I recommend that the line be drawn in substantially the following manner: proceeding from the center of the mouth of the Menominee river—that is, the center between the pierheads as now located—thence north and eastward in the geographical center of the portion of Green Bay lying west of Chambers Island to a point where said line would intersect a line extended westward through the center of the Rock Island passage to the Michigan mainland, and thence eastward through the center of the Rock Island passage to the center of Lake Michigan. The description I have outlined could be readily ascertained technically and incorporated in a decree.

AS TO SO-CALLED GRASSY ISLAND.

Findings of Fact.

In the opinion in the original case this court said:

"We therefore hold, as to this section of the boundary, that from Lake Brulé to the mouth of the Menominee the line, which is now fixed and finally established by long acquiescence, follows the channels of the Brulé and Me-

nominee wherever they are free from islands; that wherever islands are encountered above the Qinnesec Falls the line follows the channel nearest the Wisconsin mainland, so as to throw all such islands into Michigan; and that wherever islands are encountered below the Quinnesec Falls the line follows the channel nearest the Michigan mainland, so as to throw all such islands into Wisconsin."

In the decree it is provided:

"* * * where islands occur in the Menominee river below the Quinnesec Falls, the line shall pass through the channel nearest the Michigan bank, so as to throw all such islands into Wisconsin. Provided further, that the land known as 'Merryman's island', being surveyed as part of sections 20 and 29, township 36 north, of range 28 west, of the Michigan Public Survey, and the land known as 'Sugar Island', being a part of lots 1 and 2, section 11, lot 6 of section 2, and lot 1 of section 3, township 31 north, of range 27 west, of the Michigan Public Survey, is determined to be part of the mainland of Michigan."

In the bill of complaint in the case at bar it is alleged:

"The complainant herein further says that the following part of the decree also is erroneous, being a part of the last sentence in the decree, to-wit:

"And the land known as Sugar Island, being a part of lots 1 and 2, section 11, lot 6 of section 2, and lot 1 of section 3, township 31 north, of range 27 west, of the Michigan Public Survey, is determined to be a part of the mainland of Michigan.'

Complainant says that lot 1 in section 11 of the Michigan township referred to does not appear to touch any part of the modern Sugar Island, that the land specified is not in any way insular but is a part of the mainland from the days of the earliest settlement survey, that lot 2 is meant to include the eastern portion of Sugar Island, but islands are understood to be not usually parts of lots unless so shown, that lot 6 appears to include the eastern tip of Grassy Island not mentioned in the decree and to lie westerly of Sugar Island; that Grassy Island was surveyed into lots in 1848 in contrast to Sugar Island which

was not; that lot 1 to section 3 includes the eastern half of Grassy or Carpenter Cook Co. Island adjacent to lot 6 of section 2; that the decision of the court does not specifically name Sugar Island, but gives the islands south of Quinnesec Falls in the Menominee River to Wisconsin. The decree gives Sugar Island to Michigan by determining that it is a part of the mainland but describes lands which only partially can be construed to cover Sugar Island and part of said description covers Grassy Island instead. Complainant alleges that this erroneous part of the decree should be modified to carry out the decision of the court."

Defendant admits that the language describing Sugar Island is erroneous, but avers that the error consists only in that unsurveyed land is treated as being part of adjoining lots according to public survey.

The complainant now contends that the legal description embodied in the decree covers part of so-called Sugar Island and part of Grassy Island.

I find that the techinical description in the decree is erroneous. In fact, this is conceded by the state of Michigan. It does include a portion of the tract which complainant contends was an island called "Grassy Island," and which Wisconsin now claims belongs to it under the decree, as being included within the description of "all islands below Quinnesec Falls," which were given to Wisconsin.

I find as a fact that the area in controversy has not been proven to be an island in 1836, or at any other time. This area is a low, marshy tract of land, unoccupied except by a railroad bridge, and some times partly used for pasturage. In times of high water it was partially submerged, and there is some evidence of a boat having passed between it and the mainland at a time of high water many years ago. It may be that there was a bayou extending for some distance between the mainland and this tract. I find that said area was subaqueous land, and not an island proper within the purpose and intent of the decree in awarding "all islands in the Menominee river below Quinnesec Falls" to the state of Wisconsin.

Furthermore, I find that Michigan has had uninterrupted possession of the so-called "Grassy Island" for a long period of years. The technical description embodied in the decree is erroneous in that it describes part of the tract called Grassy Island and part of the tract called Sugar Island. The description followed the Michigan Public Survey as a part of the Michigan mainland. The public survey may not be complete. The sole fact question is whether or not the tract referred to as "Grassy Island" is proven to have been an island, and hence belonging to Wisconsin, under the general terms of the opinion giving all the islands below Quinnesec Falls to Wisconsin. I find that this tract was not an island in 1836 and is not now an island, but is part of the Michigan mainland. I further find that Michigan has for many years exercised jurisdiction and dominion over this tract without objection by Wisconsin.

Conclusions of Law as to Grassy Island.

I conclude that "Grassy Island" did not pass to the state of Wisconsin under the opinion and decree in the former case, and does not so pass under the record in this case.

Recommendation as to Grassy Island.

I recommend that the decree be amended; that the technical legal description therein contained be eliminated; and that the decree recite that the area of land commonly called "Grassy Island" be decreed to be a part of the mainland of Michigan and awarded to said state.

AS TO SUGAR ISLAND.

Findings of Fact.

I find that the tract of land commonly known as "Sugar Island" is not an island in fact. It may be true that in some of the ancient maps in evidence there are indications that a

small island may have existed at one time in the vicinity of this tract, but if so, its precise location and extent can not now be ascertained. The tract now described as "Sugar Island" consists to some extent of so-called "made ground" or "fill". For something like sixty years the state of Michigan has exercised full and complete jurisdiction over this tract, levying and collecting taxes thereon without any objection by the state of Wisconsin. I can not find in the record any such evidence of the insular character of this tract as would justify a disturbance of Michigan's right thereto. The decree in the former case awarded this tract to the state of Michigan. The technical legal description therein contained is misleading, if not erroneous and incomplete, but I find that the tract is not insular but is, in fact, a part of the mainland of Michigan.

Conclusions of Law as to Sugar Island.

Under the established facts, I conclude that the entire area known as Sugar Island belongs to the state of Michigan, under the rule of dominion and acquiescence as announced in the main case, and also because the same is not proven to have ever been an island.

Recommendation as to Sugar Island.

I recommend that either an accurate survey be made of Sugar Island and a correct legal description be embodied in the decree, or that the decree be modified by eliminating the legal description therein in so far as it refers to Sugar Island, and simply providing that the tract of land known as Sugar Island is decreed to be part of the mainland of Michigan.

I deem it not out of place to call attention to the fact that a new permanent concrete bridge has been erected across the Menominee river, connecting the cities of Menominee in Michigan and Marinette in Wisconsin, and this has been done by action of the legislature of the two states.

Extensive dredging has been made by the federal government in the Menominee river near its mouth, and the natural course of the river has been somewhat changed. Permanent piers have been erected, which definitely fix the "mouth of the Menominee river," as now existing.

I think that recitals in the decree as to these permanent monuments would make for certainty and clarity as to the true boundary line.

RECAPITULATION.

Summarizing my conclusions and recommendations they are as follows:

(1) That as to the Green Bay section the boundary line be established from a point in the middle of Lake Michigan opposite the center of the Rock Island passage, thence in a general westerly direction through the center of said passage, thence in a course capable of navigation by the most direct route to the mouth of the Menominee river.

In a general way such a line would follow the red line on the map as indicated by the letters R. S. Q. to the objective off Boyers Bluff—(Q) on the map; thence in a direct line to a point approximately two miles west of the Chambers Island light (Q to O on the map) thence in a direct line approximately eleven miles to the center of the mouth of the Menominee river.

(2) In the alternative, and in the event only, that the court adopts the view that the "main channel" or "most usual ship channel" refers to a ship channel in that part of the body of Green Bay lying west of Chambers Island, as assumed by both parties, then the boundary line should be drawn as follows: from the center of the mouth of the Menominee river (the center between the pierheads as now located) thence north and eastward in the geographical center of the portion

of Green Bay lying west of Chambers Island to a point where said line would intersect a line extended westward through the center of the Rock Island passage to the Michigan mainland, and thence eastward through the center of the Rock Island passage to the center of Lake Michigan.

(3) As to the tract of land known as Grassy Island, I recommend that the decree should be modified to make it clear and definite that said tract in its entirety is not an island and that it belongs to the state of Michigan.

(4) As to the tract of land known as Sugar Island, I recommend that the legal description in the decree should be eliminated and all of said tract decreed to be a part of the mainland of Michigan.

Being aware of the fact that, in view of my recommendations, I can not now present the complete form of decree to be rendered, I deem it not inappropriate to suggest that, whatever conclusion is reached by the court, I shall be willing, as part of my duties as Special Master, to supervise the formulation of the same into a decree correctly embodying the necessary and appropriate technical descriptions.

Respectfully submitted,

FREDERICK F. FAVILLE,
Special Master.

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JAN 13 1936

IN THE

Supreme Court of the United States

STATE OF WISCONSIN, *Plaintiff.*

vs.

STATE OF MICHIGAN, *Defendant.*

ORIGINAL

No. [redacted] 12

SUPPLEMENTAL REPORT OF SPECIAL MASTER

and

PROPOSED DECREE.

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IN THE

Supreme Court of the United States

STATE OF WISCONSIN, *Plaintiff,* vs. STATE OF MICHIGAN, *Defendant.*		ORIGINAL No. 15

SUPPLEMENTAL REPORT OF SPECIAL MASTER.

To the Supreme Court of the United States:

In the year 1926 the state of Michigan brought an original action in this court to determine the boundary line between the states of Michigan and Wisconsin. The opinion in that case is reported in 270 U. S. 295. Subsequently a decree was entered in said action, which is reported in 272 U. S. 398.

In November, 1932, this action was brought by the state of Wisconsin as plaintiff against the state of Michigan as defendant, the plaintiff alleging that certain errors of description were contained in the decree entered in the former case, and praying that the true boundary line be established insofar as two certain so-called islands in the Menominee river are concerned, and also as to the *waters*, as distinguished from the *islands*, in a portion of the body of water known as Green Bay. This court appointed me as Special Master to take evidence and report findings of fact and conclusions of law in said case.

This I did. Exceptions were taken to my report and the cause was duly submitted to the court.

An opinion was filed in said cause on May 20, 1935. (Law Ed. Adv. Opinions, vol. 79, p. 879.) In said opinion it is provided:

"The case is referred to the special master, and he is directed to prepare and submit to the court a form of decree which will give effect to this decision. Inasmuch as the preparation of the decree may involve the ascertainment of physical facts and the formulation of technical descriptions, the master is authorized to hear counsel, take evidence and procure such assistance, if any, as may be necessary to enable him conveniently and promptly to discharge the duties here imposed upon him. He may call upon counsel to propose forms of decree. He is directed to give them opportunity to submit objections to the form prepared by him and to include the objections, if any, in his report."

Pursuant to said directions I proceeded to take evidence of expert and lay witnesses to ascertain as nearly as possible an accurate description of the true location of the boundary line involved in this action. Counsel for both parties have presented to me proposed decrees embodying their respective claims as to the correct location of said boundary line and arguments in support thereof. I have considered all of said matters, and have made a careful personal inspection of the *locus in quo* in addition to taking the testimony of witnesses, and have formulated and present herewith a form of decree, which, in my judgment, conforms to the opinion of the court and accurately and definitely locates said boundary line. Insofar as possible I have located the same with reference to established monuments which are well known and constantly

used by navigators and fishermen who traverse the waters of Green Bay.

It will aid in considering the proposed decree if we start at the portion of the line in the Menominee River where the disputed tracts known as "Grassy Island" and "Sugar Island" are located. As to these the opinion provides:

"The decree will appropriately define the tracts called 'Grassy Island' and 'Sugar Island' and declare them to belong to Michigan."

There is a new and permanent bridge, called "The Interstate Bridge," on U. S. Highway 41, crossing the Menominee River and connecting the city of Marinette, in the state of Wisconsin, with the city of Menominee, in the state of Michigan. The tracts known as "Grassy Island" and "Sugar Island" lie between said bridge and the pierheads at the mouth of the Menominee River. The boundary line upstream from said bridge is not involved in this proceeding. By drawing the boundary line from a point on said Interstate Bridge downstream to said pierheads, both "Grassy Island" and "Sugar Island" are placed wholly on the Michigan side of said boundary line. This plan avoids the necessity of attempting to make an accurate survey of said so-called islands. It appeared at the hearing before me that, owing to defects in the public survey, it would be extremely difficult, if not impossible, to make a survey of said tracts that would conform to and "tie up" with the public survey.

With the consent of counsel for both parties, I appointed two competent engineers, one from Michigan and one from Wisconsin, to accurately locate and mark the boundary line from said Interstate Bridge to the mouth of the Menominee river, and tie the same to permanent monuments on courses and distances substantially in the

center of the channel of said river. I have embodied the description of said line in the second paragraph in the proposed decree which I submit. For the convenience of the court, I attach to this report a copy of the chart prepared by said engineers showing said portion of said boundary line. Said chart is marked Exhibit A. This ties this portion of the line to fixed and permanent monuments, and accomplishes the purpose of placing all of "Grassy Island" and "Sugar Island" within the state of Michigan, as required by the opinion of the court.

The Act creating the territory of Wisconsin and the Michigan Enabling Act were identical in effect and described the boundary line as following "the main" or "most usual ship" channel in Green Bay betwen the mouth of the Menominee river and Lake Michigan.

In the opinion the court says:

"The evidence shows, and the master found: When these Acts were passed, there was no 'main' or 'most usual ship' channel. Movements of sailing vessels, then used, were not limited to any channel and, except to avoid islands, shoals and reefs, they went directly to their destinations. Ships came and went between Lake Michigan and Green Bay to and from the mouth of the Menominee, and the southerly end of the bay, the site of the city of Green Bay. They passed east and west of Chambers Island and through the Strawberry passage. Neither state has ever exercised jurisdiction over the triangular area at the mouth of the Menominee or over any other waters of the bay that are now in controversy.

"As it is impossible to identify any channel in the bay as that indicated by the Acts referred to, the intention of Congress must be otherwise ascertained."

The court further says:

"And it confidently may be assumed that when fixing the boundary lines in the waters of the bay Congress intended that Michigan and the State to be erected out of Wisconsin Territory should have equality of right and opportunity in respect of these waters, including navigation, fishing and other uses. On the facts found, equality of right can best be attained by a division of the area as nearly equal as conveniently may be made, having regard to the matters heretofore litigated and finally adjudged between these States."

Again the court says:

"The decree to be entered in this case will establish the boundary through and along, or near, the middle of the waters of Green Bay that are here involved."

I construe the opinion as definitely holding that, it being impossible to identify any "main" or "most usual ship" channel in Green Bay as conforming to the descriptions contained in the Acts of Congress, the court adopts the rule of equality of water area in the portion of Green Bay involved as applicable to the situation.

Referring more specifically to the line the court says:

"That line commences at a point midway between the piers at the harbor entrance of the Menominee River; thence east by south seven and one-eighth miles; thence approximately north by east one-eighth east, about eight and seven-eighths miles; thence to and along a line in or near the middle of the bay to a point west of the Rock Island passage; thence easterly by courses and distances to be designated through that passage to the boundary in the middle of Lake Michigan."

It is this line that I have endeavored to definitely locate and accurately describe in the proposed decree.

I attach to this report a copy of a chart which was admitted in evidence, with various lines thereon showing the contentions of the parties and the line as fixed by me in the proposed decree. This chart is marked Exhibit B.

I.

The line from the pierheads at the harbor entrance of the Menominee river east by south seven and one-eighth miles is shown on said chart as the line A B.

The evidence shows that this line extends exactly one-half the distance from the pierheads at the harbor entrance to the opposite Wisconsin shore. For the purposes of this report, and as a matter of convenience, I shall refer to the line A B as a "base line." It gives us not only a base line for the water area to be divided, but a definite point (B) from which to draw the line in a general northerly direction therefrom equally dividing the waters of Green Bay "that are here involved."

II.

The court, in its opinion, describes the next course from point B as follows: "thence approximately north by east one-eighth east about eight and seven-eighths miles." This carries the line to a point two miles west of the Chambers Island light. It is marked on the chart as the line B C. The line B X on the chart indicates the exact geographical center of the bay, but it can not be adopted because it traverses Chambers Island, which belongs wholly to Wisconsin, and, if established, might lead to confusion as to matters involving said island. The point X, however, is the location of a permanent lighthouse maintained by the United States government, and is very

valuable as a monument because of its relation to the boundary line.

III.

From the point west of Chambers Island (C on the chart), the opinion provides that the line shall pass "*to* and along a line in or near the middle of the bay to a point west of the Rock Island passage." It is therefore necessary to draw a line from the point C, west of Chambers Island, to a point practically in the center of the bay. This is done by the line C K on the chart. This line is approximately five and one-eighth miles long. I deem this line to be in exact accord with the direction of the court in the opinion. It carries the line approximately "to" the middle of the bay, and it practically compensates Michigan for the loss of area by the diversion from the center of the bay caused by carrying the line to the west of Chambers Island. Furthermore, the point K is on a direct line between the Chambers Island light (X) and the Whaleback shoal gas buoy light (L) which is of much practical advantage to navigators and fishermen.

IV.

From the point K on the chart the next course and distance is accurately set forth in the proposed decree, and is shown on the chart by the line K L. The establishment of this line has a twofold advantage; it is almost exactly in the geographical center of the bay, and it also is directly in line with the Chambers Island light (X) to the south and the Whaleback shoal gas buoy (L) to the north. The Chambers Island light is a permanent and well-known guidepost. At point L is located a gas buoy marking the eastern end of the Whaleback shoal. This buoy is maintained by the United States. It is removed

during the winter months and replaced after the ice has gone out in the spring. Its location is, however, determined by accurate measurements and is the same each year. The record shows that this gas buoy will, in all probability, be replaced by a permanent lighthouse in the near future.

V.

Under the opinion of the court, the line dividing the water area of the bay is to proceed "along a line in or near the middle of the bay *to a point west of the Rock Island passage*." It is the portion of the line included in this description that causes the chief contention between the parties to this action. Briefly stated it is the claim of the state of Wisconsin that the line should extend northward so as to divide equally the *entire* body of Green Bay lying north of the base line A B. The contention of Wisconsin is that, from the common point C on the chart the line should extend northward to the *west* of Whaleback shoal at D, and thence northward, either following the line D E F G H on the chart or the line D a′ H. I can not accept either alternative. Neither the Acts of Congress establishing the boundary line, nor the opinion of this court in this case, contemplates any such a conclusion. The portion of Green Bay lying *south* of the "base line" A B is not divided between the two states. Likewise, as I view it, the portion of Green Bay lying to the *north* of "a point west of the Rock Island passage" is not "here involved," and not to be divided. I see no authority for projecting the line northward from "the point west of the Rock Island passage" in order to divide all the waters of Green Bay that extend in that direction. Such a line would not conform to the opinion of the court. I therefore reject the claim of Wisconsin that the line should be

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V.

Under the opinion of the court, the line dividing the water area of the bay is to proceed "along a line in or near the middle of the bay *to a point west of the Rock Island passage.*" It is the portion of the line included in this description that causes the chief contention between the parties to this action. Briefly stated it is the claim of the state of Wisconsin that the line should extend northward so as to divide equally the *entire* body of Green Bay lying north of the base line A B. The contention of Wisconsin is that, from the common point C on the chart the line should extend northward to the *west* of Whaleback shoal at D, and thence northward, either following the line D E F G H on the chart or the line D a′ H. I can not accept either alternative. Neither the Acts of Congress establishing the boundary line, nor the opinion of this court in this case, contemplates any such a conclusion. The portion of Green Bay lying *south* of the "base line" A B is not divided between the two states. Likewise, as I view it, the portion of Green Bay lying to the *north* of "a point west of the Rock Island passage" is not "here involved," and not to be divided. I see no authority for projecting the line northward from "the point west of the Rock Island passage" in order to divide all the waters of Green Bay that extend in that direction. Such a line would not conform to the opinion of the court. I therefore reject the claim of Wisconsin that the line should be

extended northerly of the "point west of the Rock Island passage" which I fix at R on the chart.

In the opinion the court says that the line is to proceed from the point west of the Rock Island passage "easterly by courses and distances to be designated through that passage to the boundary in the middle of Lake Michigan." It is argued by counsel for Wisconsin that by the use of the word "easterly" and the use of the plural in referring to "courses and distances" the court contemplated that the "point west of the Rock Island passage" need not be directly west of the passage but only "westerly" therefrom and that it should proceed by diverse courses and distances through the Rock Island passage. I do not concur in this interpretation of the opinion, and especially so in view of the language of the Acts of Congress and the previous record in this case. The opinion calls for a line passing generally northward "in or near the middle of the bay" until it reaches "*a point west of the Rock Island passage.*" The line L R, shown on the chart, is just such a line. This is "in and along the middle of the bay" and the point R is directly west of the Rock Island passage.

It is also argued by Wisconsin that Green Bay is a curving bay, and that the trend of the bay is northeasterly and southwesterly and that a point in the center thereof opposite the Rock Island passage is northwesterly of said passage instead of being west thereof. The opinion very distinctly defines the point in question as being "*west* of the Rock Island passage." I therefore locate it west of said passage and not "northwesterly" or "westerly" therefrom.

This I deem to be wholly consistent with the Acts of Congress and the opinion of the court.

The state of Michigan proposes as an alternative of the line L R the line L M, on the theory that the line M H

passes through the Rock Island passage directly parallel to the base line A B, thus making a parallelogram out of the area of Green Bay here involved. I do not accept this alternative, nor the alternative proposed by Wisconsin and shown on the chart by the lines A B C D E F G H or A B C D a′ H. I do not think that any one of these lines conforms to the opinion of the court.

I am not directed to divide *all* the waters of Green Bay lying north of the base line A B. I am ordered to draw a line "in or near the middle of the bay *to* a point west of the Rock Island passage." When I have reached that point I am to turn the line "easterly." That point I find to be R on the chart, and I have accurately described the line passing from the mouth of the Menominee River to said point, in the decree I tender herewith.

I call the court's attention to the fact that the point R is not only approximately in the middle of the bay east and west, but is in the direct line between the Whaleback shoal buoy and the Minneapolis shoal light shown at the upper edge of the chart, and it has determinable bearings on five existing lights, which is of great importance especially in navigation. It is of like value to fishermen. Wisconsin has filed exceptions especially directed to this portion of this report. I am advised that Wisconsin will support its contentions by printed record and argument filed in this proceeding.

VI.

From the Rock Island passage the opinion provides that the line is to pass "to the boundary in the middle of Lake Michigan." I recommend the line H S shown on the chart for this course and distance. The line is drawn scientifically along a perpendicular to the axis of Lake Michigan in that locality and passes to the middle of the

lake. I think the Wisconsin Territorial Act calls for a right angle turn in the center of Lake Michigan. The line described therein passes northerly along the center of Lake Michigan to a point opposite the Rock Island passage, and thence through said passage. I think this description contemplated a right angle turn in the center of Lake Michigan opposite the Rock Island passage. Such is the line I have proposed in the decree.

The record in this proceeding shows that by accurate measurements by a planimeter the water area of Green Bay "here involved" is divided almost exactly equally between Wisconsin and Michigan with a slight advantage to the state of Wisconsin, in the decree I present.

I attach hereto the decree which I propose, the same being marked Exhibit C.

I also attach the two alternative decrees proposed by the state of Wisconsin marked respectively Exhibit D and Exhibit E.

Pursuant to the order of the court I have submitted this report and the proposed decree to counsel for both parties and I attach hereto the objections and exceptions filed by the state of Wisconsin marked Exhibit F.

The state of Michigan filed no objections or exceptions to the decree which I propose.

I have filed with the clerk of this court a transcript of the evidence, and the exhibits in the hearing had before me, all duly certified by me.

Respectfully submitted,

FREDERICK F. FAVILLE,
Special Master.

EXHIBIT C.

IN THE SUPREME COURT OF THE UNITED STATES.

STATE OF WISCONSIN, *Plaintiff,* vs. STATE OF MICHIGAN, *Defendant.*	ORIGINAL No. 15

MASTER'S PROPOSED DECREE

This cause came on to be heard upon the supplemental report of the Special Master and exceptions thereto. The court now being fully advised in the premises and for the purpose of carrying into effect the conclusions set forth in the opinion of this court, announced May 20, 1935 (79 L. Ed. 879);

It is now ORDERED, ADJUDGED, and DECREED as follows:

1. The supplemental report of the Special Master filed in this cause is hereby approved, and all exceptions thereto are hereby overruled.

2. The decree of this court heretofore made and entered November 22, 1926, and recorded in 272 U.S. 398, is hereby confirmed in all respects, except as to that portion of said decree, beginning on page 398, which reads as follows:

"To the center of the harbor entrance of said Menominee river, thence in a direct line to the most usual ship channel of Green Bay, passing to the north of Green

Island and westerly of Chambers Island and through the Rock Island passage into Lake Michigan, by courses and distances as follows: From a point midway between the outer ends of the Menominee river piers, thence east by south, seven and one-half miles to the center of the most usual ship channel of the Green Bay, thence along said ship channel north by east one-eighth east, eight and seven-eighths miles, thence continuing along said ship channel north by east seven-eighths east, twenty-seven miles, thence continuing along said ship channel, east one-fourth north, ten and one-fourth miles, thence east three-fourths north to the boundary between the state of Michigan and the state of Wisconsin in the middle of Lake Michigan. Provided further, that the land known as 'Merryman's Island,' being surveyed as part of sections 20 and 29, township 36 north, of range 28 west, of the Michigan Public Survey, and the land known as 'Sugar Island,' being a part of lots 1 and 2, section 11, lot 6 of section 2, and lot 1 of section 3, township 31 north, of range 27 west, of the Michigan Public Survey, is determined to be part of the mainland of Michigan." Said portion of said decree is withdrawn, set aside, vacated, and annulled.

3. In lieu of the description above stricken from said decree, the said boundary, through that portion of the Menominee river lying between the cities of Menominee, in the state of Michigan, and Marinette, in the state of Wisconsin, to the center of the harbor entrance between the pierheads at the mouth of the Menominee river, is decreed to be defined as follows:

After the words: "thence down the center of the main channel of the Rivers Brule and Menominee," and the provision as to the islands, the line is defined as follows: "to the intersection of the longitudinal center line of the

EXHIBIT C.

IN THE
SUPREME COURT OF THE UNITED STATES.

STATE OF WISCONSIN, *Plaintiff,* vs. STATE OF MICHIGAN, *Defendant.*		ORIGINAL No. 15

MASTER'S PROPOSED DECREE

This cause came on to be heard upon the supplemental report of the Special Master and exceptions thereto. The court now being fully advised in the premises and for the purpose of carrying into effect the conclusions set forth in the opinion of this court, announced May 20, 1935 (79 L. Ed. 879);

It is now ORDERED, ADJUDGED, and DECREED as follows:

1. The supplemental report of the Special Master filed in this cause is hereby approved, and all exceptions thereto are hereby overruled.

2. The decree of this court heretofore made and entered November 22, 1926, and recorded in 272 U.S. 398, is hereby confirmed in all respects, except as to that portion of said decree, beginning on page 398, which reads as follows:

"To the center of the harbor entrance of said Menominee river, thence in a direct line to the most usual ship channel of Green Bay, passing to the north of Green

Island and westerly of Chambers Island and through the Rock Island passage into Lake Michigan, by courses and distances as follows: From a point midway between the outer ends of the Menominee river piers, thence east by south, seven and one-half miles to the center of the most usual ship channel of the Green Bay, thence along said ship channel north by east one-eighth east, eight and seven-eighths miles, thence continuing along said ship channel north by east seven-eighths east, twenty-seven miles, thence continuing along said ship channel, east one-fourth north, ten and one-fourth miles, thence east three-fourths north to the boundary between the state of Michigan and the state of Wisconsin in the middle of Lake Michigan. Provided further, that the land known as 'Merryman's Island,' being surveyed as part of sections 20 and 29, township 36 north, of range 28 west, of the Michigan Public Survey, and the land known as 'Sugar Island,' being a part of lots 1 and 2, section 11, lot 6 of section 2, and lot 1 of section 3, township 31 north, of range 27 west, of the Michigan Public Survey, is determined to be part of the mainland of Michigan." Said portion of said decree is withdrawn, set aside, vacated, and annulled.

3. In lieu of the description above stricken from said decree, the said boundary, through that portion of the Menominee river lying between the cities of Menominee, in the state of Michigan, and Marinette, in the state of Wisconsin, to the center of the harbor entrance between the pierheads at the mouth of the Menominee river, is decreed to be defined as follows:

After the words: "thence down the center of the main channel of the Rivers Brule and Menominee," and the provision as to the islands, the line is defined as follows: "to the intersection of the longitudinal center line of the

concrete bridge on United States Highway No. 41 between the cities of Menominee, Michigan, and Marinette, Wisconsin, with the center line of the stream crossing of said bridge, which said point of intersection bears north forty-two degrees and thirty minutes (42°30′) east, a distance of four hundred twenty-four and five tenths (424.5) feet from the southerly end of said stream crossing of said bridge, and a distance of nine hundred and ninety-nine and ninety-three hundredths (999.93) feet upon the same course from the center line of Eggner street as now laid out and existing in the city of Marinette, Wisconsin, and which said point also bears south forty-two degrees and thirty minutes (42°30′) west, two thousand three hundred fifty-eight and one-tenth (2,358.1) feet from the south line of Ogden avenue as now laid out and existing in the city of Menominee, Michigan, all these courses being measured along the center line of said bridge and its approaches, thence south seventy-four degrees and twenty-eight minutes (74°28′) east, one thousand one hundred twenty-seven and seven-tenths (1,127.7) feet to a point from which a monument set upon a nearby island consisting of an iron pin set in a concrete block of approximately one-half ton bears south eighteen degrees and fifty-five minutes (18°55′) west, a distance of seventy-one (71) feet, thence south sixty-six degrees and fifty-four minutes (66°54′) east, one thousand seven hundred thirty-nine and three-tenths (1,739.3) feet to a point from which a monument set in a nearby island consisting of an iron pin set in a concrete block of approximately one-half ton bears south nineteen degrees and thirty minutes (19°30′) west, one hundred sixty and two-tenths (160.2) feet, thence along the center line of the dredged channel of the Menominee river through the center of the movable span of the drawbridge between the cities of Menominee and Marinette, and continuing

along the center of said dredged channel of said river to a point midway between the outer ends of the Menominee Harbor piers.

4. From a point midway between the outer ends of the Menominee Harbor piers, thence upon a true course of which the azimuth is one hundred one degrees and fifteen minutes (101°15′) for eleven thousand four hundred seventy (11,470) meters, the same being approximately east by south for seven and one-eighth (7 1/8) miles.

5. Thence upon a true course of which the azimuth is eleven degrees and forty-five minutes (11°45′) for fourteen thousand two hundred fifty (14,250) meters, the same being approximately north by east for eight and seven-eighths (8 7/8) miles.

6. Thence upon a true course of which the azimuth is fifty-eight degrees and fifty minutes (58°50′) for eight thousand two hundred ninety (8,290) meters, the same being approximately northeast by east one-fourth east for five and one eighth (5 1/8) miles.

7. Thence upon a true course of which the azimuth is forty-two degrees and eighteen minutes (42°18′) for sixteen thousand seven hundred eighty (16,780) meters, the same being approximately northeast one-fourth north for ten and one-half (10 1/2) miles.

8. Thence upon a true course of which the azimuth is twenty-eight degrees and ten minutes (28°10′) for eleven thousand five hundred eighty (11,580) meters, the same being approximately north northeast one-half east for seven and one-fourth (7 1/4) miles.

9. Thence upon a true course of which the azimuth is ninety degrees (90°) for twenty-seven thousand one hundred seventy (27,170) meters, the same being ap-

proximately east for sixteen and seven-eighths (16 7/8) miles.

10. Thence upon a true course of which the azimuth is one hundred twenty degrees (120°) for forty-five thousand six hundred (45,600) meters, the same being approximately southeast by east three-eights east for twenty-eight and three-eighths (28 3/8) miles, to the center of Lake Michigan.

11. The costs of this action, including the fees and expenses incurred by the Special Master, shall be divided equally between the parties.

EXHIBIT D.

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1935

In Equity

No. 15 Original

Before Honorable F. F. Faville, Special Master.

STATE OF WISCONSIN, *Plaintiff,*

vs.

STATE OF MICHIGAN, *Defendant.*

WISCONSIN'S PROPOSED DECREE.

This cause having been heard and submitted and the court having considered the same and announced its conclusions in an opinion delivered May 20th, 1935 (79 L. Ed. 879) wherein the same was referred to the Special Master to prepare and submit to the court a form of decree to give effect thereto, and the Special Master having considered the same, taken evidence thereon and heard the arguments of counsel, I hereby submit and recommend to the court that the decree herein be entered in the following form:

IT IS ORDERED, ADJUDGED AND DECREED that the boundary between the states of Wisconsin and Michigan be and is hereby fixed and finally established as follows:

Beginning at the boundary line between the State of Michigan and State of Wisconsin in the center of the

main channel of the Menominee River at the center of the stream crossing of the interstate bridge between the cities of Marinette, Wisconsin, and Menominee, Michigan, thence (this portion of the boundary description is to be obtained by survey completed and described by the City Engineer of Marinette, Wisconsin, and the City Engineer of Menominee, Michigan) to the point midway between the outer ends of the Menominee River piers at the mouth thereof; (in the following description, the azimuth of 0 is true North) thence along a course with an azimuth of 101 degrees 15 minutes (approximately East by South) 11,470 meters (approximately 7 1/8 miles); thence along a course with an azimuth of 11 degrees 45 minutes (approximately North by East) 14,250 meters (approximately 8 7/8 miles) to the sailing objective two miles West of Chambers Island light; thence along a course with an azimuth of 54 degrees 20 minutes (approximately Northeast 7/8 East) 8,140 meters (approximately 5 miles) to the point where said line intersects a line drawn from Chambers Island light to the Black Spar on the Northwest limits of Whaleback Shoal; thence along a course with an azimuth of 35 degrees 44 minutes (approximately Northeast 7/8 North), 16,890 meters (approximately 10 1/2 miles), to the Black Spar 1 near the Northwest limits of Whaleback Shoal; thence along a course with an azimuth of 33 degrees 15 minutes (approximately Northeast by North) 24,570 meters (approximately 15 1/4 miles) on a line drawn between said Black Spar and Minneapolis Shoal, to a point where said line intersects a line drawn through the Rock Island passage and over the St. Martin's Island Shoal gas buoy therein on a course with an azimuth of 120 degrees; thence on a course with an azimuth of 120 degrees (approximately Southeast by East 3/8 East) across the St. Martin's Island Shoal gas buoy in the Rock Island pass-

age, 69,850 meters (approximately 43 1/2 miles) to the middle of Lake Michigan.

(The costs of this proceeding in this court shall be divided equally between the parties.)

EXHIBIT E.

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1935

In Equity

No. 15 Original

Before Honorable F. F. Faville, Special Master.

STATE OF WISCONSIN, *Plaintiff,*

vs.

STATE OF MICHIGAN, *Defendant.*

WISCONSIN'S ALTERNATIVE PROPOSED DECREE.

This cause having been heard and submitted and the court having considered the same and announced its conclusions in an opinion delivered May 20th, 1935 (79 L. Ed. 879) wherein the same was referred to the Special Master to prepare and submit to the court a form of decree to give effect thereto, and the Special Master having considered the same, taken evidence thereon and heard the arguments of counsel, I hereby submit and recommend to the court that the decree herein be entered in the following form:

IT IS ORDERED, ADJUDGED AND DECREED that the boundary between the states of Wisconsin and Michigan be and is hereby fixed and finally established as follows:

Beginning at the boundary line between the state of Michigan and the state of Wisconsin in the center of the main channel of the Menominee River at the center of the stream crossing of the interstate bridge between the cities of Marinette, Wisconsin, and Menominee, Michigan, thence (this portion of the boundary description is to be obtained by survey completed and described by the City Engineer of Marinette, Wisconsin, and the City Engineer of Menominee, Michigan), to the point midway between the outer ends of the Menominee River piers at the mouth thereof; (in the following description the azimuth of 0 is true North) thence along a course with an azimuth of 101 degrees 15 minutes (approximately East by South) 11,470 meters (approximately 7 1/8 miles); thence along a course with an azimuth of 11 degrees 45 minutes (approximately North by East) 14,250 meters (approximately 8 7/8 miles) to the sailing objective two miles west of Chambers Island light; thence along a course with an azimuth of 41 degrees 45 minutes (approximately Northeast 1/4 North) 24,740 meters (approximately 15 3/8 miles) to Black Spar 1 near the Northwest limits of Whaleback Shoal; thence along a course with an azimuth of 80 degrees 17 minutes (approximately North Northeast 3/4 East) 16,520 meters (approximately 10 1/4 miles) to a point midway between Boyer's Bluff light on Washington Island, Wisconsin, and the mouth of the Bark River in Delta County, Michigan; thence along a course with an azimuth of 63 degrees 36 minutes (approximately Northeast by East 5/8 East) 12,050 meters (approximately 7 1/2 miles), to a point midway between Boyer's Bluff light on Washington Island, Wisconsin, and Point Peninsula in Delta County, Michigan; thence along a course with an azimuth of 130 degrees 16 minutes (approximately Southeast 3/8 East) 14,910 meters (approximately 9 1/4 miles) to a point

midway between Pottawatomie Light on Rock Island, Wisconsin, and the southwest point of St. Martin's Island, Michigan; thence along a course with an azimuth of 110 degrees 23 minutes (approximately East Southeast 1/4 East) 4,240 meters (approximately 2 5/8 miles) to the red gas buoy on St. Martin's Island Shoal; thence along a course with an azimuth of 82 degrees 49 minutes (approximately East 5/8 North) 64,890 meters (approximately 40 3/8 miles) to the middle of Lake Michigan.

(The costs of this proceeding in this court shall be divided equally between the parties.)

EXHIBIT F.

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1935

In Equity

No. 15 Original

STATE OF WISCONSIN, *Plaintiff,*
vs.
STATE OF MICHIGAN, *Defendant.*

PLAINTIFF'S OBJECTIONS TO THE SUPPLEMENTAL REPORT OF AND DECREE RECOMMENDED BY THE SPECIAL MASTER.

Plaintiff, State of Wisconsin, hereby excepts and files its objections to the Supplemental Report and Decree submitted by the Special Master to said court, pursuant to the directions of said court in its decision of May 20, 1935, in the following particulars:

I.

As to Master's Supplemental Report:

Plaintiff excepts to the following findings of fact and conclusions of law in the report of the Special Master and to each of them respectively:

1. That point K on the chart attached to said Supplemental Report of the Special Master is a desirable

point in the boundary between said states;—for the reasons that a line proceeding from point C on said chart, being the point two miles west of Chambers Island light, direct to the Whaleback Shoal to-wit, the line C D upon the said chart, gives approximate equality of right to the contending states, and results in one line rather than two, and tends to lessen confusion respecting the location of the boundary.

2. That the line K L on the chart attached to said Supplemental Report of the Special Master is almost exactly in the geographical center of Green Bay, and is a desirable line for the boundary between said states;—for the reasons assigned in exception No. 1; that the line proposed by plaintiff, to-wit: the line C D upon the said chart results in connecting termini by one line, rather than two, and tends to lessen confusion and uncertainty concerning the location of said line; and further on the ground that point L, as may be ascertained by simple measurements, is not in the geographical center of Green Bay, and that the point D upon said chart, proposed by plaintiff, is more nearly in the exact geographical center of Green Bay.

3. That the portion of Green Bay lying to the north of a point west of the Rock Island passage is not here involved;—for the reasons that Green Bay is a curving bay, and makes a right angle turn between its entrance at the Rock Island passage and the general direction of the greater part of it; that the trend of the greater part of Green Bay is northeasterly and southwesterly and that a point in the center thereof opposite the Rock Island passage is northwesterly of said passage and not west thereof; that a line drawn from a point west of the Rock Island passage results in a boundry that is much nearer Wisconsin area than Michigan, and fails to give equality of

right, either of navigation or fishing to the citizens of Wisconsin; that Green Bay does not terminate at the point west of the Rock Island passage, but continues northerly of said point and that Door County, Wisconsin, Washington and Rock Islands, Wisconsin, are riparian and adjacent to that part of Green Bay lying north of said point, and residents thereof are entitled to equality of right thereto on a parity with residents of Michigan on the mainland and islands on the opposite side thereof.

4. That there is no justification for projecting the boundary northward in Green Bay of a point west of the Rock Island passage in order to divide the waters of Green Bay that extend in that direction;—for the reasons assigned in exception 3 hereof, and for the further reasons that that area of Wisconsin made up of Door County Peninsula, Washington and Rock Islands, are so near to the resulting boundary line, as to fail to give them equality with Michigan; that although the area of Wisconsin riparian to this part of Green Bay is less than that of Michigan, the reverse situation at the mouth of the Menominee River is not treated in the same manner; and that plaintiff concedes that line R H recommended by the Master as shown on the chart attached to the Master's Supplementary Report is a more direct course for vessels moving between the entrance of Green Bay and the mouth of the Menominee River than the line proposed by Wisconsin in that it "cuts the corner," but that the same principle is not followed out of the Menominee River by line A B C as shown upon said chart, and that if line R H is justified because of convenience, the line to be adopted in the first course from the mouth of the Menominee River should follow the same principle and should become line A C.

5. That point R and the line L R on the chart submitted with the Master's Report is in the middle of the waters of Green Bay;—for the reason that simple measurements from the coast of Washington Island, Wisconsin, and the mainland of Michigan perpendicular to the axis of the greater part of Green Bay establishes the fact that the lines upon said chart, designated lines D E or D a′ are each more nearly in the middle of the waters of Green Bay.

6. That the Supreme Court intended the line drawn through the middle of Green Bay to terminate its northerly course at a point precisely west of the Rock Island passage;—for the reasons that the court clearly indicated that it intended to treat the two riparian states on a parity respecting waters lying between them, and further that the axis of the greater part of Green Bay is not north and south, but northeasterly and southwesterly, and that the line from the Rock Island passage northwesterly into the waters of Green Bay should intersect the axis of Green Bay at approximately right angles to give such parity.

7. That the alternative lines proposed by Wisconsin, to-wit: lines A B C D E F G H or A B C D a′ H as shown upon the chart submitted with the Master's Report, do not conform to the opinion of the court,—for the reasons that said line A B C D E F G H is a line connecting points midway between Wisconsin and Michigan throughout its course, through the entire area of Green Bay and gives equality to both states; and that line A B C D a′ H proposed by plaintiff in the alternative, contains the least segments in describing the boundary, gives equality of right to both states; and that line a′ H S thereof, is perpendicular to and the shortest line between the center line of Green Bay drawn along the axis thereof, and the center line of Lake Michigan drawn along the axis thereof.

8. That this court directed the Special Master to terminate the northerly progress of the boundary in the waters of Green Bay, precisely west of the Rock Island passage;—for the reason that the court clarified the word "west" by using the word "easterly", immediately following, and intended thereby a point generally west of the Rock Island passage, which would give equality of right to both states.

9. That the line R H as shown upon the chart attached to the Master's Report, conforms to the opinion of the court;—for the reasons that said line is much nearer to Wisconsin than to Michigan, fails to divide the waters of Green Bay equally; fails to give equality of right to the fishermen of the State of Wisconsin living adjacent thereto, with those of the state of Michigan; and does not follow the principle that Congress intended the State of Michigan, and the State to be carved out of Wisconsin Territory to have equality of right in respect of these waters.

10. That the line H S as shown upon the chart attached to the Master's Report, conforms to the opinion of the court, and that the court intended a line to be determined from the Rock Island passage, perpendicular to the axis of Lake Michigan;—for the reasons that conceding that such a line treats the two contending states fairly in the waters of Lake Michigan, a continuance of said line into the waters of Green Bay, to-wit: the line a' H as shown upon said charts, likewise treats the two states fairly and with equality in the waters of Green Bay; that the axis of Lake Michigan and the greater part of Green Bay are approximately parallel to each other, and that the shortest line between said two axes in a line perpendicular to both; that equitably the direction of the boundary line from within Green Bay in approaching the entrance thereof

should continue without being to the center of Lake Michigan; and that it is inequitable to impose upon the plaintiff a line within the waters of Green Bay that does not divide the waters equally between Washington Island and Rock Island on the Wisconsin side, and St. Martin's Island on the Michigan side, unless said inequity in such division is compensated in the waters of Lake Michigan opposite the entrance of Green Bay, or in a parallel situation off the mouth of the Menominee River.

11. That that part of the boundary recommended by the Special Master, to-wit: the line A B C K L R H S as shown upon the chart attached to said report be adopted as conforming to the opinion of this court;—for the reasons that said line does not give equality of right to the contending states in the waters of Green Bay and Lake Michigan; and that said line does not establish the boundary "through and along, or near, the middle of the waters of Green Bay that are here involved."

II.

As to the Decree Recommended by the Special Master:

Plaintiff excepts to the following recommendations for a decree in the report of the Special Master and to each of them respectively:

1. To the courses of the proposed boundary set forth in paragraphs 4 to 10 inclusive of the Master's recommended decree, which describe by courses and distances that part of said boundary located in the waters of Green Bay and Lake Michigan, and are designated upon the chart attached to the Master's Supplemental Report, as line A B C K L R H S;—for the reasons that said line fails to give "equality of right and opportunity in respect of these waters;" that it disregards the decision of this

court that "equality of right can best be attained by a division of the area as nearly as conveniently may be made, having regard to the matters heretofore litigated and finally adjudged between the parties;" that it fails to follow a course "through and along, or near, the middle of the waters of Green Bay that are here involved;" and fails to follow the intention of Congress that the two states be accorded "equality of right in respect of these waters."

Plaintiff contends that in lieu of said paragraphs 4 to 10 inclusive, a proper boundary which will conform to the opinion of the court is designated on the chart attached to the Master's Supplemental Report as line A B C D a' S and that that part of the Master's recommended decree consisting of paragraphs 6 to 10 inclusive should not be adopted by the court, but that the following should be adopted in lieu thereof:

"6. Thence upon a true course of which the azimuth is forty-one degrees and forty-five minutes (41°45') for twenty-four thousand seven hundred forty (24,740) meters, the same being approximately northeast one-fourth north for fifteen and three-eighths (15 3/8) miles.

"7. Thence upon a true course of which the azimuth is thirty-three degrees and fifteen minutes (33°15') for twenty-four thousand five hundred seventy (24,570) meters, the same being approximately northeast by north fifteen and one-fourth (15 1/4) miles.

"8. Thence upon a true course of which the azimuth is one hundred twenty degrees (120°) for sixty-nine thousand eight hundred fifty (69,850) meters, the same being approximately southeast by east three-eighths east, forty-three and one-half (43 1/2) miles, to the center of Lake Michigan."

Plaintiff further contends in the alternative, that if the court deems that the line R H as shown upon said chart, although giving inequality in respect of these waters, is justified as "cutting corners" because of convenience, that then plaintiff is entitled to have the same principle adopted off the mouth of the Menominee River, and that in that event that part of the Master's recommended decree consisting of paragraphs 4 to 6 inclusive be not adopted by the court, but that the following should be adopted in lieu thereof:

"4. From a point midway between the outer ends of the Menominee River piers, thence upon a true course of which the azimuth is forty-nine degrees and forty-nine minutes (49°49′) for seventeen thousand seven hundred three (17,703) meters, the same being approximately northeast three-eighths east for eleven miles."

Respectfully submitted,

JAMES E. FINNEGAN,
Attorney General of Wisconsin,

JOSEPH G. HIRSCHBERG,
Deputy Attorney General of Wisconsin,

J. E. MESSERSCHMIDT,
Assistant Attorney General of Wisconsin,

ADOLPH J. BIEBERSTEIN,
Special Counsel.

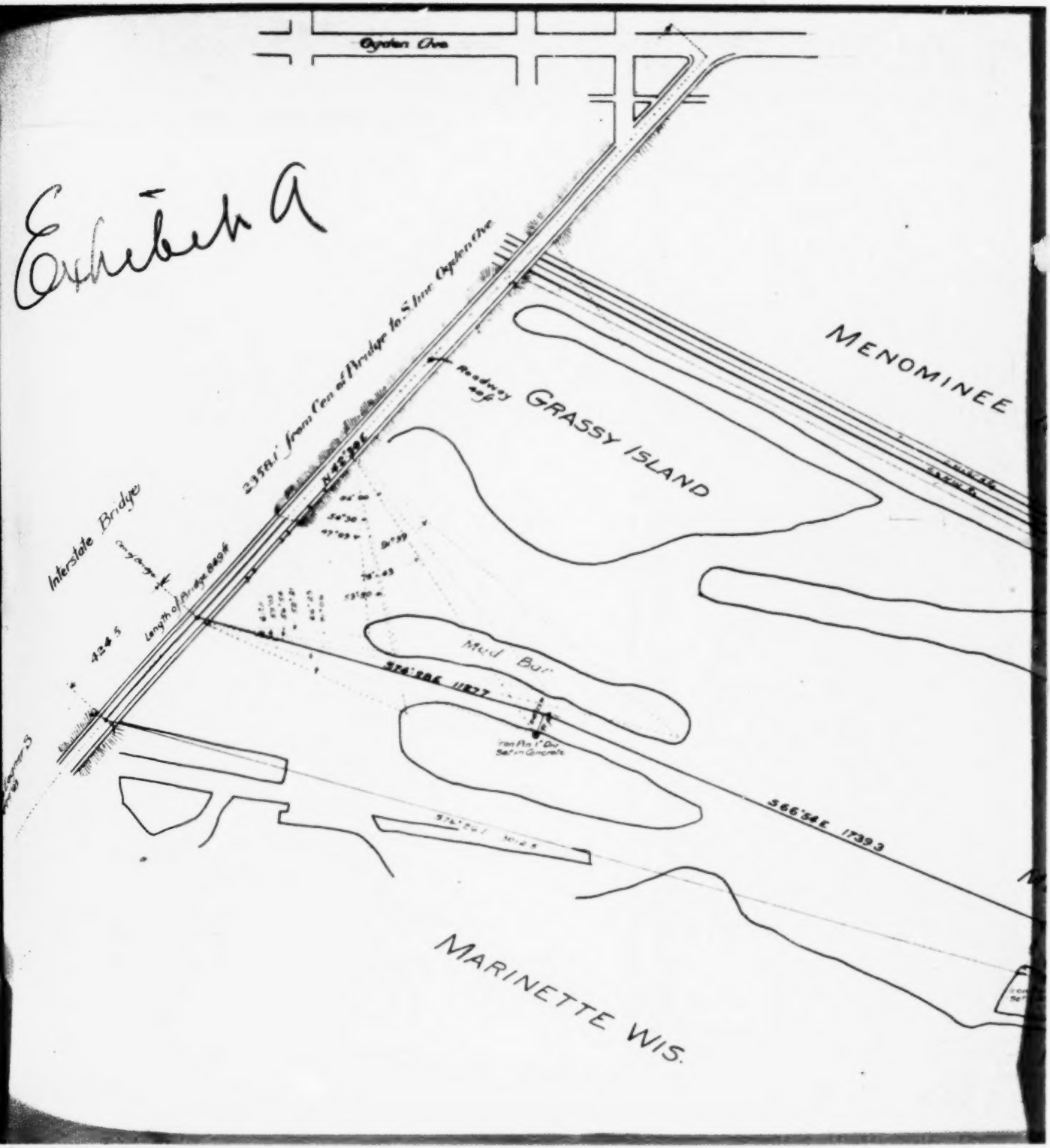
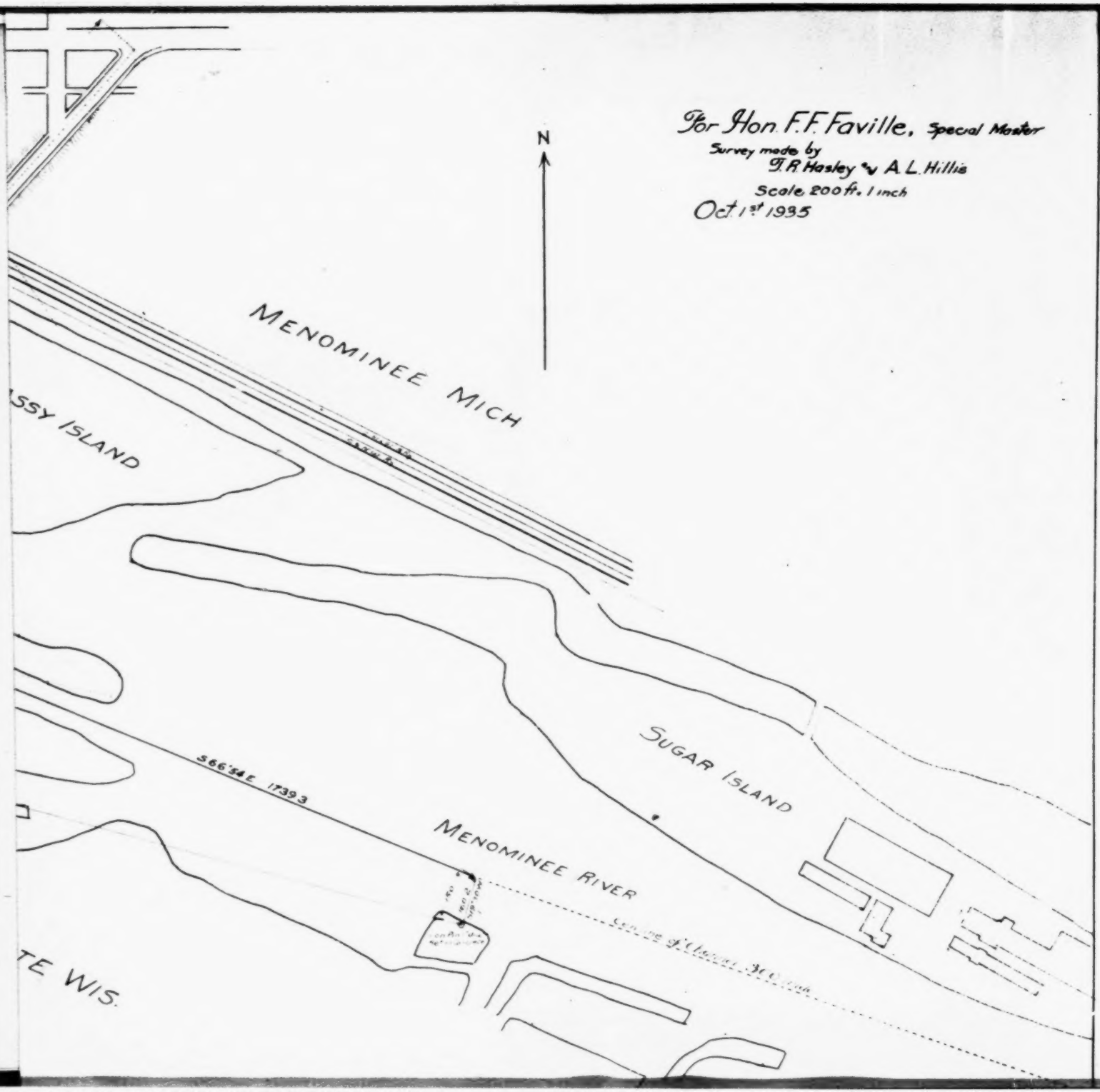


Exhibit A
Ogden Ave
MENOMINEE
GRASSY ISLAND
Interstate Bridge
Mud Bar
MARINETTE WIS.


For Hon. F.F. Faville, Special Master
Survey made by
T.R. Hasley & A.L. Hillis
Scale 200 ft. 1 inch
Oct. 1st 1935
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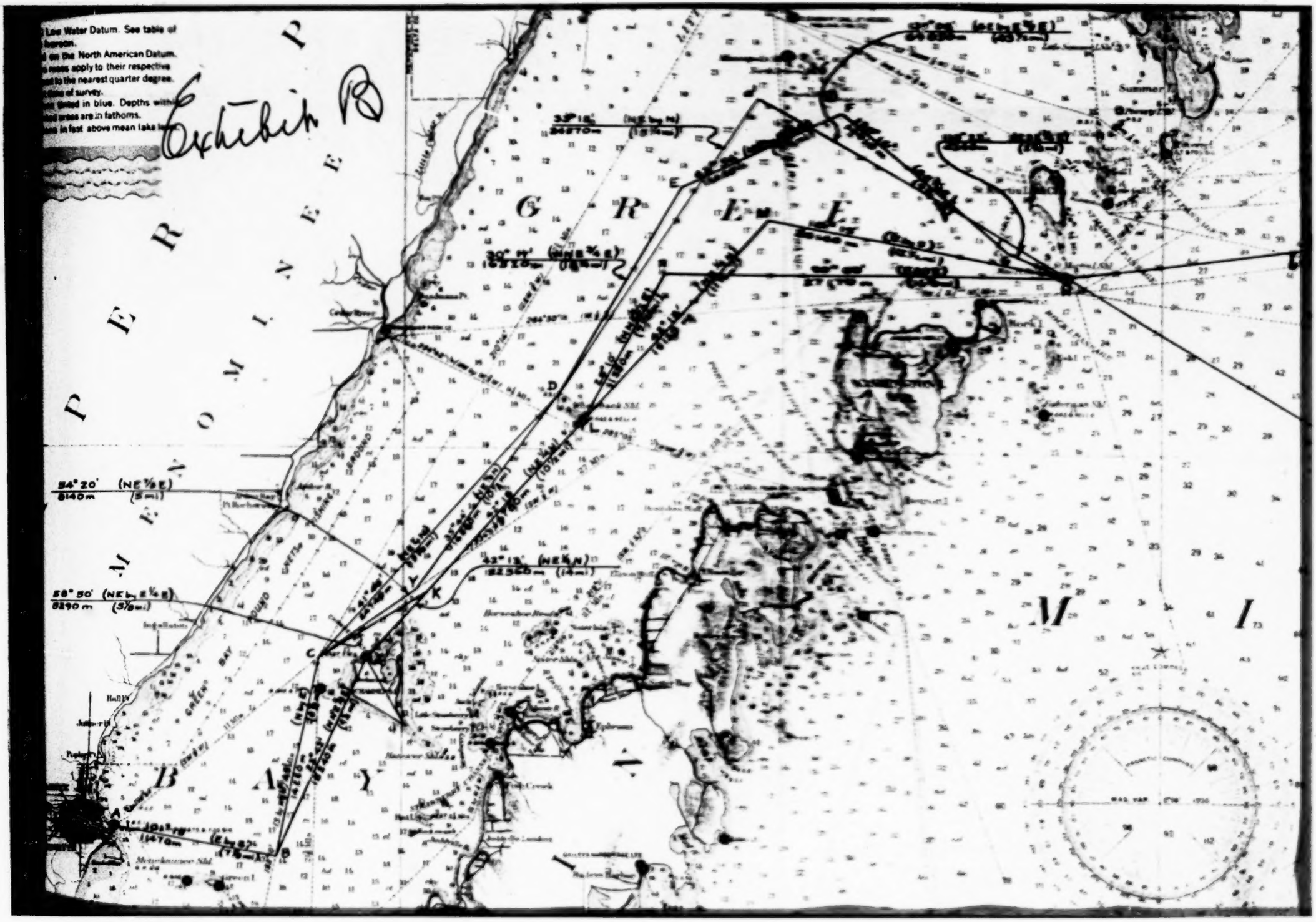
SSY ISLAND
SUGAR ISLAND
S66°34E 1739.3
MENOMINEE RIVER
TE WIS.


Low Water Datum. See table of
thereon.
on the North American Datum.
bearings apply to their respective
ed to the nearest quarter degree.
date of survey.
ines tinted in blue. Depths within
tinted areas are in fathoms.
ights in feet above mean lake level
Exhibit B
PENINSULA
GREEN
BAY
MICHIGAN
54° 20' (NE ½ E)
8140 m (5 mi)
58° 50' (NE by E ½ E)
8890 m (5½ mi)
32° 13' (NE ½ N)
22360 m (14 mi)
Summer
Cedar River
Escanaba
Gladstone
Ingallston
Hall Pt
Rapid River
Nahma
Manistique
Mouth of Manistique River
Fishermans
Garden Island
Summer Island
Poverty Island
Fayette
Big Bay de Noc
Little Bay de Noc
Stonington Peninsula
Point Detour
Cedar Point
Sand Point
Harbor Point
Rock Island
Mid Channel
Middle Island Passage
Middle Island
Rock Island Passage
Rock Island Light
Grand Traverse Island
Grand Traverse Island Light
Gravelly Island
Gravelly Island Light
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Gravelly Island Shoal
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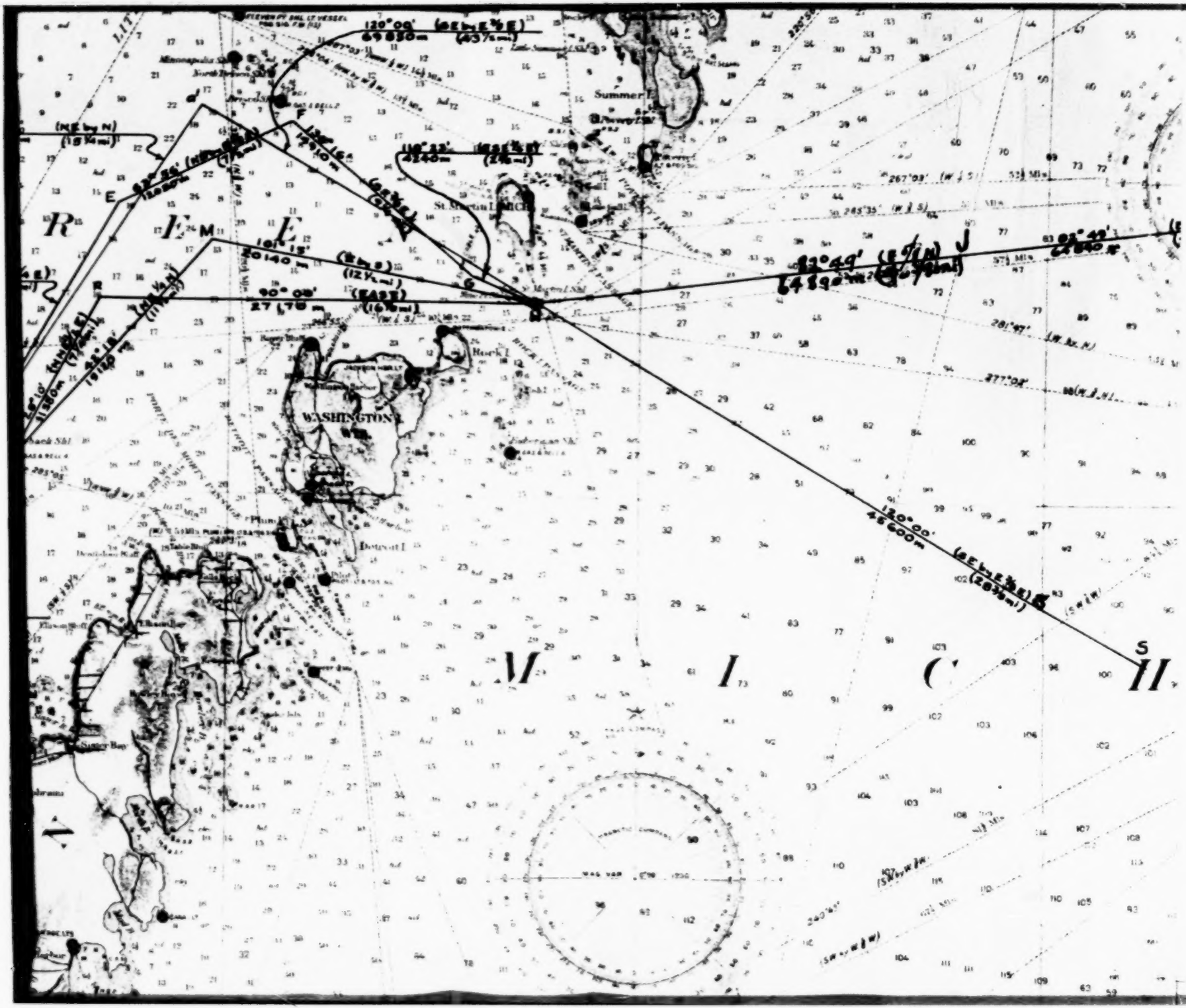
Gravelly Island Reef


Summer I.
WASHINGTON I.
Detroit I.
Sister Bay
120°00'
69 830 m
(43½ mi)
120°00'
45 600 m
(28⅓ mi)
90° 00'
27 675 m
(16⅞ mi)
(EAST)
(12½ mi)
20 140 m
(11 mi)
19 140 m
(10 mi)
2240 m
(1⅜ mi)
64 890 m
(40⅓ mi)
(NE by N)
(18¼ mi)
(NE by E ½ E)
(43½ mi)
(SE by E ½ E)
(28⅓ mi)
267°09'
265°35'
277°08'
280°47'
(W by N)
(W by S)
(SW by W)
(SW by W ½ W)
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

In Equity

No. 12 Original

STATE OF WISCONSIN,

Plaintiff,

v.

STATE OF MICHIGAN,

Defendant.

PLAINTIFF'S EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

JAMES E. FINNEGAN,
Attorney General of Wisconsin,

JOSEPH G. HIRSCHBERG,
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November 20, 1934

Mayer Printing Co., Madison, Wis.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

In Equity

No. 15 Original

STATE OF WISCONSIN,

Plaintiff,

v.

STATE OF MICHIGAN,

Defendant.

PLAINTIFF'S EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

Plaintiff hereby excepts to the Findings of Fact and to the Conclusions of law made and filed by the Special Master on the 12th day of November, 1934, and to his recommendations for a decree in the following particulars:

AS TO THE LOCATION OF THE BOUNDARY LINE UNDER THE ACTS OF CONGRESS

Findings of Fact

Plaintiff excepts to the following Findings of Fact in the report of the Special Master and to each of them respectively:

1. (Page 31, par. 2, line 17):

"Many ancient maps were introduced in evidence. They were interpreted by a map expert. They were not drawn to scale; they were mostly what might properly be termed 'sketch maps' of explorers or engineers. Some are apparently inaccurate as to the location of islands and channels. Slight, if any, dependence can be placed upon them as showing any 'most usual ship channel' extending lengthwise in Green Bay in or about 1836."

2. (Page 32, par. 5, line 35):

"This engineer obviously found it impossible to locate 'the center of the most usual ship channel of Green Bay' in the body of the bay."

3. (Page 33, par. 1, line 2):

"Captain Cram's report as to this section of the boundary line is so indefinite and inconclusive that it is not a certain aid in determining the proper location of the boundary line in the waters of Green Bay in 1840. It is unfortunate that the engineer sent for the very purpose of locating 'the most usual ship channel of Green Bay' in 1840, reported that he was unable to do so; and this rather adds to the difficulty of now locating such a channel, instead of clarifying it."

4. (Page 33, par. 2, line 15):

"I find as a fact that there was no such thing as a 'main channel' or a 'most usual ship channel' in the body of Green Bay at the time of the adoption of said Acts of Congress."

5. (Page 33, par. 2, line 25):

"I repeat, I cannot find from any competent evidence that in 1836 there was any ship channel in the body of Green Bay that could properly be said to be

the 'most usual ship channel' or the 'main channel' of said bay."

6. (Page 34, par. 1, line 2):

"We still find that there is no evidence whatever available upon which one could place a finding of any certain location of a 'most usual ship channel' in this portion of Green Bay in 1836."

7. (Page 34, par. 2, line 6):

"I therefore find that if, as a fact, there did exist in 1836 any such thing as the 'most usual ship channel' in the body of Green Bay, its true location can not now be ascertained and the same can not now be definitely established."

CONCLUSIONS OF LAW ON CONTENTIONS OF THE PARTIES AS TO THE LOCATION OF BOUNDARY LINE UNDER CONGRESSIONAL ACT

Plaintiff excepts to the following Conclusions of Law in the report of the Special Master and to each of them respectively:

8. (Page 34, par. 3, line 24):

"Roughly speaking, the boundary would follow the line A. B. C. on the map, and thence in a generally northward course in the center of that portion of the bay until it would intersect a line extended from the point Q on the map to the Michigan mainland, and thence eastward through the center of the Rock Island passage to the center of Lake Michigan."

9. (Page 37, par. 3, line 30):

"Wisconsin has no claim to any of the portion of Green Bay lying north of the last-mentioned line."

10. (Page 38, par. 1, line 5):

"I deem this assumption (that the Enabling Act had reference to a channel extending north and south lengthwise of Green Bay)* to be erroneous, as I shall undertake to demonstrate in the next division of this report."

MASTER'S CONSTRUCTION OF CONGRESSIONAL ACTS

Plaintiff excepts to the following Conclusions of Law in the report of the Special Master and each of them respectively:

11. (Page 39, par. 1, line 1):

"Notwithstanding this assumption of counsel for both parties, I can not accept the premise as correct and undertake to apply the description of the Congressional Acts in such a manner, and I deem it my duty to make my own findings on the record before me, even though they may not coincide with the assumptions of counsel for both parties."

12. (Page 40, par. 2, line 15):

"If the Congress had in mind '*a main channel* of Green Bay' that ran north and south lengthwise of Green Bay, some seventy or more miles, where would the 'point' opposite such a 'main channel' be? *Such* a description so applied would be an absurdity. Who could locate such 'a point?' It is an impossibility. If, however, we construe the words 'main channel' as I think Congress must have understood and intended to use them, in the light of the physical conditions and the information then possesed by Congress, we have no difficulty whatsoever. Congress located 'a point' in the middle of Lake Michigan and fixed that point

*Explanatory phrase ours.

opposite 'the main channel of Green Bay.' Then continuing the line from the 'point in the middle of Lake Michigan and opposite the main channel of Green By' it passed *'through said channel'* into Green Bay proper."

13. (Page 40, par. 3, line 29):

"What was this 'main channel' through which the line passed? It could not, in my judgment, be other than the *main* one of the channels that existed between Lake Michigan and Green Bay. Which one of the channels between these islands was the 'main' or 'most usual' channel could be readily ascertained by scientific and factual investigation."

14. (Page 41, par. 1, line 2)

"Whichever one of *these* island channels was *'the main channel'* of Green Bay was the one opposite which the *'point'* in Lake Michigan was fixed. Then the line proceeds from this 'point' *'through said channel and* Green Bay to the mouth of the Menominee River.' Nothing whatever is said about a channel to be followed *in* Green Bay after the line passed through the channel opposite the point in Lake Michigan.

15. (Page 41, par. 2, line 10):

"If the description was intended to mean that the course must be through the main channel of the *body* of Green Bay to the mouth of the Menominee River, there was no need whatever of inserting the words 'and Green Bay.'"

16. (Page 41, par. 3, line 18):

"I can not escape the conclusion that Congress never meant to refer to a 'main channel' in the *body* of Green Bay, by the language of the Wisconsin Act."

17. (Page 41, par. 5, line 32):

"The problem becomes simple (reconciliation of words in Wisconsin Territorial Act and Michigan Enabling Act)* when we consider that the Wisconsin Act was passed first and that the 'main channel' therein referred to is the *main* one of the several channels leading from Lake Michigan into Green Bay."

18. (Page 42, par. 1, line 1):

"*This* being the 'main channel' referred to in the Wisconsin Act, applying the language of the Michigan Act passed later, the course of the boundary under the Michigan Act is from the mouth of the Menominee river '*to* the center' of *this* 'main' or 'most usual' channel leading from Green Bay into Lake Michigan then 'through the center' of said ship channel 'to the middle of Lake Michigan,'—in other words, to the 'point' in Lake Michigan opposite said channel, as described in the Wisconsin Act."

19. (Page 42, par. 1, line 9):

"Neither act attempted to describe any channel in the body of Green Bay between the mouth of the Menominee River and the 'main channel' between the islands. In the Wisconsin Act, once the line passes through the main island channel it then goes through Green Bay to the mouth of the Menominee River. By reverse description the line goes from the mouth of the Menominee river to this 'most usual' or 'main channel (among the islands) and through it to the point in the middle of Lake Michigan."

20. (Page 42, par. 1, line 22):

"I think it apparent that Congress, with the information then before it, intended to draw a boundary

*Explanatory phrase ours.

line from a point in the middle of Lake Michigan opposite the main or most usual island channel leading into Green Bay, through the center of such channel into Green Bay, and thence by the most direct and navigable route to the mouth of the Menominee River. Such a line is consistent with the description in both acts; it is consistent with the known conditions as to the island channels; * * *"

21. (Page 42, par. 2, line 34):

"To attempt to construe these acts otherwise leaves an impossible description of a 'point' opposite a 'main channel' some seventy miles in length, and also calls for the location of a 'main' or 'most usual ship channel' in Green Bay, where the whole expanse of water was one 'main' or 'most usual ship channel' traversed indiscriminately by the boats of that day."

22. (Page 43, par. 2, line 4.):

"There is some corroborative evidence in the record which supports the construction of the language of the Enabling Acts which I have suggested."

23. (Page 43, par. 8, line 36):

"No one can misunderstand where Lyon thought the line would run. It would go northward in Lake Michigan to the Fox Islands. This would be practically opposite the channels leading into Green Bay. Congress did not run the line to the Fox islands, but instead down the middle of Lake Michigan to 'a point' opposite the main channel into Green Bay. This was substantially the course that Lyon predicted. Then, exactly as Lyon anticipated, it went '*along the main ship channel into Green Bay and up the bay to the mouth of the Menominee River.*' I think there can be no doubt whatever that Lyon, on the ground at the time and investigating the situation before Congress, clearly understood that the 'main channel' he was re-

ferring to was the main channel between the islands leading from Lake Michigan into Green Bay. I think Congress understood the situation exactly as did Lyon."

24. (Page 44, par. 2, line 14):

"I am convinced from the language of the two Acts, and all the surrounding facts and circumstances, that Congress, in using the expressions 'main channel' and 'most usual ship channel' meant to refer to the main one of the channels between the islands that separate Green Bay and Lake Michigan, and not to a channel in the open body of Green Bay. Under the record there is no difficulty in locating such a channel as being the Rock Island passage."

RECOMMENDATIONS AS TO THE GREEN BAY SECTION

Plaintiff excepts to the following recommendation in the report of the Special Master that the boundary line should be drawn from:

25. (Page 44, par. 4, line 5):

"A point in the middle of Lake Michign, opposite the center of the Rock Island passage, thence in a generally westerly direction through the center of said passage, and thence in a course capable of navigation by the most direct route to the mouth of the Menominee River. It would follow the red line on the map (RSQ) to the objective off Boyer's Bluff (marked by proximately two miles west of Chambers Island Light proximately two mlies west of Chambers Island light (the red line from Q to O on the map), and thence in a

direct line approximately eleven miles to the center of the mouth of the Menominee River."

Respectfully submitted,

JAMES E. FINNEGAN,
Attorney General of Wisconsin,

JOSEPH G. HIRSCHBERG,
Deputy Attorney General of Wisconsin,..

J. E. MESSERSCHMIDT,
Assistant Attorney Gereral of Wisconsin,

ADOLPH J. BIEBERSTEIN,
Special Counsel for Wisconsin.

November 20, 1934

FILE COPY

DEC 10 1

IN THE SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1934

No. 12, Original — In Equity

STATE OF WISCONSIN,
Plaintiff,
vs.
STATE OF MICHIGAN,
Defendant.

DEFENDANT'S EXCEPTIONS TO REPORT OF SPECIAL MASTER

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FRANKLIN DEKLEINE CO., PRINTERS AND BINDERS, LANSING

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IN THE SUPREME COURT
of the
UNITED STATES

OCTOBER TERM, 1934

No. 15, Original — In Equity

STATE OF WISCONSIN,
Plaintiff,
vs.
STATE OF MICHIGAN,
Defendant.

DEFENDANT'S EXCEPTIONS TO REPORT OF SPECIAL MASTER

Now comes the State of Michigan, by Patrick H. O'Brien, Attorney General, and Meredith P. Sawyer, Special Counsel, and takes exception to the findings of fact and conclusions of law contained in the report of the Honorable Frederick F. Faville, Special Master, filed November 12, 1934, in the above entitled court, in the above entitled cause, and in such respect, more particularly alleges:

STATEMENT RE TRANSCRIPTIONAL ERRORS

Without excepting thereto, defendant here refers to the findings of fact by the Special Master set forth in said report on pages twenty-three and twenty-four.

The errors in courses and distances there discussed have been called "transcriptional errors".

They are patent, conceded by both parties, and the paramount calls of the boundary, as enunciated in the same decree, override their significance.

Defendant, in taking the following exceptions, assumes that these so-called "transcriptional errors" will be corrected either by amendment of the decree in that respect or judicial interpretation of the language there employed.

FIRST EXCEPTION

The defendant excepts to the finding of the Special Master set forth upon page twenty-five of said report in the following language:

> "I find that not only does the decree in the former case contain mutual mistakes, but also that *it was entered by consent of the parties under the mistaken belief that it complied with the opinion of the court.* Counsel for the parties consented to the decree in the form in which it was drawn, and the court adopted *it because of such consent of counsel.*"
>
> (Italics ours.)

A. Defendant insists that the decree was in no respect a consent decree, but was adopted by the court following its opinion and full consideration of the proposals of both parties, as to decree, as shown on the records of this court; and as a determination thereof.

B. That the allegations of the bill of complaint, in this case, in this respect, have failed of proof.

The plaintiff herein alleges (complaint, page 31):

> "That the plaintiff, State of Wisconsin, is damaged by the erroneous description in said decree; that she loses thereby about thirty-five square miles of fishing area opposite the City of Menominee, which had always been under the jurisdiction of Wisconsin and over which Michigan has never exercised any jurisdiction, and the plaintiff would be damaged by having its citizens compelled to take out licenses from Michigan authorities for the right to fish never heretofore required."

That the findings of the Special Master upon this question refute this allegation of the bill of complaint. (See report page 27, also page 28, and Conclusion on page 30.)

C. That the finding of the Special Master that the decree is erroneous in this respect is not based on the theory that the claimed error was consented to by mistake and resulted in a description which did not comply with the opinion; and is based upon the theory that *this court* erred in its opinion in finding that the "evidence shows that there are two distinct ship channels, to either of which this description might apply". (270 U. S., Page 315.)

The Special Master finds (report page 31):

> "I find that there was no such thing as a . . . well recognized or defined ship channel in the waters of Green Bay in 1836."

D. Defendant insists that the entire basis of the finding above excepted to is without the pleadings in this case and involves consideration of matters heretofore tried and determined by this court.

E. Defendant insists that the finding here excepted to is not supported by the evidence in this case.

SECOND EXCEPTION

Defendant excepts to the finding of the Special Master set forth upon page twenty-five of said report in the following language:

> "I find that the issue now tendered as to the true location of the boundary line, in the *waters* of Green Bay as distinguished from the islands therein, was not directly involved in the former suit; that no evidence was offered in that case on the question of jurisdiction over said waters except incidentally, and that the court made no definite pronouncement in relation thereto in its opinion."

A. Defendant insists that the description in the decree in the former case was adopted by the court as a judicial construction of the language of the Michigan Enabling Act defining the line and applied to the facts as disclosed in the records in that case and was based on the pleadings (including motions), and evidence.

B. Defendant insists that the issue as to the precise location of the line in the waters of Green Bay was raised by the pleadings in the former case and squarely by the proposals of both parties for decree. That this court had before it in the former case, all the evidence upon the subject, which has been adduced in this case, with the exception of evidence tending to prove an exact line in said waters established by user.

That the issue tendered in this case is not as to whether this court erroneously construed the language of the Acts of Congress in defining a line through channels where no exact line was establsihed by user, but rather

as to whether the decree, carrying into effect such definition, should be set aside in favor of a line established by user.

Wisconsin alleged in this case that it consented to the entry of decree based on a judicial construction of the language of the Acts, because counsel for Michigan asserted that the boundary in this respect had not been altered by use. Michigan has admitted such statement.

Michigan insists that if any line were established by user it is the line defined in the decree—(transcriptional errors eliminated).

Michigan joined issue with Wisconsin in this case upon the question of the existence of a different line established by user; not on the correctness of the judicial construction of the language of the Acts of Congress.

C. Defendant insists that the Special Master has enlarged the issue and included matters heretofore determined by this court.

D. Defendant insists that the only issue before the court in this case is as to the existence of a line through the water areas, established by user, and differing from the line defined by the decree (with transcriptional errors eliminated).

THIRD EXCEPTION

Defendant excepts to the conclusion of law of said Special Master set forth on page twenty-five of said report, in the following language:

> "Also, the decree being a consent decree and being erroneous, as I find it to be, it may properly be corrected in this action. Counsel for defendant frankly concedes in his brief that 'an erroneous decree resulting from consent of the party is not *res adjudicata*'. Such is the law."

A. Defendant insists that the decree, as written, represents the determination of the court upon the definition of the boundary by Act of Congress and that in the absence of a finding that the line as defined by Act of Congress was altered by user, there is no basis for modifying said decree (except as to admitted transcriptional errors).

FOURTH EXCEPTION

Defendant excepts to the conclusion of law of said Special Master set forth on page twenty-six of said report in the following language:

> "I also conclude as a matter of law that, inasmuch as the issue of dominion over the *water* area in Green Bay, as distinguished from the *islands* therein, was not directly in issue in the former suit, that as no evidence was offered in the former case upon that question and no definite pronouncement made by the court, complainant is not barred from prosecuting this action to have the true location of the portion of said boundary involved in this case now determined."

A. Defendant insists that the issues and evidence in the former case and the present case were identical, except that in the former case, Michigan alleged that the line as defined by Congress "to and through the middle of the most usual ship channel of Green Bay" had not been altered by user, and Wisconsin conceded this. In the present case, Wisconsin denied this allegation, claimed a line established by acquiescence and user, and that counsel for Wisconsin had consented to the decree under the mistaken belief that there was no such line.

B. Defendant insists that the existence of a line established by acquiescence and user is a condition prece-

dent to modification of the decree, except as to the admitted transcriptional errors.

C. Defendant insists that the fact that no proof of dominion over waters was offered by Wisconsin in the prior case and no pronouncement made by the court on that question does not throw the case open for reconsideration upon the construction of statutes there undertaken, but only upon the question—Was there a jurisdictional line and, if so, is it different from the line defined by the decree?

FIFTH EXCEPTION

Defendant excepts to the conclusion of law of said Special Master set forth on page thirty of said report in the following language:

> "I conclude that neither state has shown such an open, long-continued, uninterrupted, and peaceable possession of the disputed area and the exercise of sovereignty and dominion over it as to establish any definite line as the true boundary line in Green Bay."

A. Defendant insists that the record in this case discloses possession and dominion by Michigan over the water areas on the Michigan side of the line defined by said decree (with transcriptional errors eliminated) for upwards of fifteen years. That the exercise of jurisdiction was open and notorious and hostile to the rights of the State of Wisconsin and was acquiesced in by that state for more than fifteen years.

B. Defendant insists that if any line was established by acquiescence and user, it was the line defined by the decree (transcriptional errors eliminated).

C. Defendant insists that the record in this case as to exercise of dominion and jurisdiction by Michigan and acquiescence therein by Wisconsin up to the line defined by said decree (transcriptional errors eliminated) is the best evidence available today of the intention of Congress and amounts to a construction of the Acts of Congress by the parties themselves.

SIXTH EXCEPTION

Defendant excepts to the finding of fact by said Special Master set forth on page thirty-one of said report in the following language:

> "I find that there was no such thing as a charted sailing course, or any well-recognized or defined ship channel in the waters of Green Bay in 1836. The ships of that day that traversed Green Bay were almost entirely sailing vessels of light draft, and, except for avoiding islands, shoals, and reefs, they traversed the waters of Green Bay in the most direct and convenient way in which to reach their destinations, without being limited to any defined channel."

A. Defendant insists that there were two ship channels as reported by Captain Cram and found by this court in its opinion and assumed by both parties to this cause. That these two ship channels ran lengthwise of Green Bay from the settlement (now City of Green Bay) at the southern extremity of the bay, both passing east of Green Island—thence, one passed east and one west of Chambers Island—and thereafter, one north and one south of the Washington Island group.

B. Defendant insists that both of said channels were defined by natural obstructions to navigation and

that the middle of either channel can be readily determined and has been determined and adopted by government agency in delineating upon the charts a sailing course for such channels.

C. Defendant insists that this court, in its opinion, determined that the ship channel lengthwise of Green Bay, passing west of Chamber's Island and through the Rock Island Passage, was the most usual ship channel referred to in the Acts of Congress.

D. Defendant insists that this court, by its decree, determined that the sailing courses given on the government charts through the channels involved, were the center lines of such ship channels.

SEVENTH EXCEPTION

Defendant excepts to the finding of fact by said Special Master set forth on page thirty-three of said report in the following language:

> "I find as a fact that there was no such thing as a 'main channel' or a 'most usual ship channel' in the body of Green Bay at the time of the adoption of said Acts of Congress. Ships . . . entered and left the mouth of the Menominee River . . . I repeat, I cannot find from any competent evidence that in 1836 there was any ship channel in the body of Green Bay that could properly be said to be the 'most usual ship channel' or the 'main channel' of said bay."
>
> "In the former case the court has established the right of Wisconsin to Chambers Island, and, of necessity, the waters between it and the mainland of the Door peninsula would belong to Wisconsin; so that we may eliminate the 'Strawberry island passage' from our consideration and confine our inquiry to ascertaining the location of the 'most usual

ship channel' in the portion of Green Bay lying west of Chambers Island. But this does not remove the difficulty, for, limiting our inquiry to this portion of Green Bay, we still find that there is no evidence whatever available upon which one could place a finding of any certain location of a 'most usual ship channel' in this portion of Green Bay in 1836."

"I therefore find that if, as a fact, there did exist in 1836 any such thing as the 'most usual ship channel' in the body of Green Bay, its true location can not now be ascertained and the same can not now be definitely established."

A. Defendant insists that the existence of a "most usual ship channel" in the body of Green Bay at the time of the adoption of said Acts of Congress and its general location was determined by this court in its opinion in the former case.

B. Defendant insists that the sailing courses through the channels thus determined were adopted by this court as being "the centre of the most usual ship channel" by its decree in the former case.

C. Defendant insists that no issue upon the existence of such channels in the body of Green Bay is contained in the pleadings in this case and that no evidence has been offered upon said subject by defendant in this case.

D. Defendant insists that the definition contained in the "Wisconsin Territorial Act," "main channel" has been eliminated from consideration by the adoption of the words "centre of the most usual ship channel" in the "Michigan Enabling Act" and the fact that the boundary in the "Wisconsin Statehood Act" follows the Michigan boundary.

E. Defendant insists that there is no evidence that ships entered and left the mouth of the Menominee River in 1836, but that there is evidence that ships with passen-

gers or goods for Menominee at that time and for some years thereafter remained on the course for Green Bay until opposite the Menominee River and approached the river's mouth from that direction and discharged passengers or cargoes a considerable distance outside the mouth of the Menominee River.

F. Defendant insists that the language of the Michigan Enabling Act recognized that the center of the most usual ship channel of Green Bay did not enter the Menominee River and included the preposition "to" to indicate that the line after leaving the Menominee River should pass directly "to" the center of said ship channel.

This was Michigan's contention in its motion to amend proposed decree in the former case and Michigan's theory was adopted by this court in its decree and should stand as a judicial construction of that language by this court.

G. Defendant insists that this court, in its opinion, determined that there were two ship channels running lengthwise of Green Bay and through the island passages into Lake Michigan in 1836, and further determined that possession by Wisconsin of the islands between said ship channels and acquiescence therein by Michigan, was the best evidence of which of said ship channels was the "most usual" at the time.

H. Defendant insists that the theory that possession of the islands be considered as possession up to the center of the ship channels, was adopted in formulating the decree, and that in the event the existence of such channels be denied, that the determination of this court as to the location of the line in the Green Bay sector—and possibly in total—must be abandoned. That the theory of the opinion is a line defined by Congress and construed by the parties by possession and acquiescence.

If the line in the waters of Green Bay has not been so determined, then the entire cause should be reopened for determination upon the grant.

The existence of two ship channels in the body of Green Bay is essential to the theory that one thereof was accepted by the parties as the boundary through possession of the intervening islands by one party and acquiescence therein by the other.

EIGHTH EXCEPTION

Defendant excepts in toto to the conclusions of law on contentions of the parties as to location of boundary line under Congressional Acts as contained in said report on pages 34-35-36-37-38.

A. Defendant insists that the conclusions so arrived at are upon issues not raised by the pleadings in this cause.

B. Defendant insists that the conclusions so arrived at are upon issues which are res adjudicata, having been determined upon pleadings and proofs by the decree.

C. Defendant insists that such conclusions are based upon erroneous findings of fact.

NINTH EXCEPTION

Defendant excepts to the "Master's Construction of Congressional Acts" as contained in said report on pages 38-39-40-41-42-43-44.

A. Defendant insists that the construction of said acts is not an issue in this case.

B. Defendant insists that the "Wisconsin Territorial Act" was superseded by the "Michigan Enabling Act" and the "Wisconsin Statehood Act".

C. Defendant insists that the language of the Controlling Acts is not ambiguous in that it states:

> "... To the center of the most usual ship channel of the Green Bay of Lake Michigan; thence through the center of the most usual ship channel of the said bay."

Such language is not open to judicial construction as ambiguous because it plainly refers to a ship channel in said bay through the center of which the boundary is to pass from a point opposite the mouth of the Menominee River to its termination in Lake Michigan.

The only gaps in such boundary, not specifically determined by the language of said act, are the gaps between the mouth of the Menominee and the center of the most usual ship channel and between the termination of said ship channel and the point in the center of Lake Michigan.

The court in its decree adopted the shortest possible line between such points to close these gaps.

D. Defendant insists that these conclusions of the Master are based upon erroneous findings of fact above excepted to.

E. Defendant insists that these conclusions are upon matters which are res adjudicata.

TENTH EXCEPTION

Defendant excepts to the recommendations of the Special Master as to the Green Bay Section (1) set forth on pages forty-four and forty-five of said report.

Defendant insists that the line as defined in the decree, with transcriptional errors corrected, which follows the sailing courses of government charts from a point there-

on opposite the Menominee River, is the boundary as defined by Congress and established by acts of the parties and decree of this court and is not subject to revision in this case.

ELEVENTH EXCEPTION

Defendant excepts to the alternative recommendation of the Special Master as to the Green Bay Section (2) set forth on page forty-five of said report.

Defendant insists that such recommendation is not based on the evidence in said case nor upon the Acts of Congress granting dominion to the respective states, and proposes a line impossible of demarcation and one not claimed by either party to this suit.

These exceptions are based upon the records and files in this cause and the evidence and exhibits returned to the court by the Special Master with his report; and on the records and files, evidence, exhibits and decree in the case of Michigan vs. Wisconsin heretofore determined in this court.

Respectfully submitted,

STATE OF MICHIGAN, Defendant.

PATRICK H. O'BRIEN,
Attorney General,

MEREDITH P. SAWYER,
Special Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

In Equity

No. 12 Original

STATE OF WISCONSIN,

Plaintiff,

v.

STATE OF MICHIGAN,

Defendant.

ABSTRACT OF TESTIMONY TAKEN BEFORE THE SPECIAL MASTER PERTINENT TO THE EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

A. J. BIEBERSTEIN,
Special Counsel for Wisconsin,

MEREDITH P. SAWYER,
Special Counsel for Michigan.

Mayer Printing Co., Madison, Wis.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

In Equity

No. 15 Original

STATE OF WISCONSIN,

Plaintiff,

v.

STATE OF MICHIGAN,

Defendant.

ABSTRACT OF TESTIMONY TAKEN BEFORE THE SPECIAL MASTER PERTINENT TO THE EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

OPENING STATEMENT BY MR. BIEBERSTEIN

The pleadings in this case show no issue as to the line between the Montreal River and the Lake of the Desert.

They show some issue as to the islands of the Menominee River, particularly as to Grassy and Sugar Islands, which are islands that lie near the mouth of the Menominee

River at its entrance to Green Bay, and the principal issue is the line within Green Bay itself. The plaintiff states the decision of the court upheld the position of Wisconsin that the line after leaving the mouth of the Menominee River turned in a northerly direction and passed through Rock Island Channel.

The Michigan contention in the other action was that the boundary line as given in the Michigan Enabling Act was the Death's Door passage, which is somewhat south of the Rock Island passage. Apparently there is no issue in this case as to Death's Door passage, it seems to be conceded the line goes through the Rock Island passage and it is conceded the line leaves the mouth of the Monominee River. The issue is: Where does the line traverse between those two points?

It develops from the pleadings that there is some controversy as to what took place in Washington at the time the decree was drafted. The decision of the court was handed down in February, 1926. Subsequently counsel for both Michigan and Wisconsin apparently had considerable correspondence and considerable discussion in the matter of the preparing of the decree to conform to the decision of the court, and in November, 1926, counsel for both sides were apparently in Washington, and a decree was finally formulated, and that is the decree entered by the court.

Both litigants claim that a mistake was made in the description of the line within Green Bay waters, and in the designation of Sugar Island and Grassy Island.

OPENING STATEMENT BY MR. SAWYER

It is the defendant's position that there are only two errors in this decree, and that all of the other matters determined by the court were properly considered and that the court would now have no jurisdiction to change anything, except these matters which we all admit are clerical errors.

The opinion of the Supreme Court ended with the statement that apparently the boundary was defined by user to an extent which would be satisfactory to all the parties.

The Wisconsin department decided that the definition was not sufficient in the opinion and they prepared and filed a proposed decree which is in the record. The State of Michigan filed objections to that proposed decree and filed a proposed amended decree. The parties spent two or three days in Washington discussing the questions covering a comparatively small area on which the definition was not settled by the opinion and in which use had not determined the location of the line.

There were charts in evidence which showed the shipping course.

There had been testimony in the case of ownership and taxation of Sugar Island, but there was no good technical description of Sugar Island in the record at that time. During the time this decree was under discussion it was sought to obtain such description, and it has developed that there is an error in it to this extent, that the territory which now comprises what we speak of as Sugar Island is partly within and partly without the government lots of the Michigan survey mentioned in the decree. A large part of it is outside the meander line of those lots and lies between that

meander line and what we claim as the boundary of Michigan, the center of the channel of the river.

It is our contention that all that is necessary is to clarify that language to show that the description of Sugar Island as given in the decree is not technically within those lots.

The Michigan Enabling Act called for the boundary to come down the main channel of the Menominee River to the middle of the most usual ship channel of Green Bay. The language is silent as to how the line shall pass from the mouth of the Menominee River to the middle of the most usual ship channel.

That question was not called to anybody's attention until the time of this proposed decree, and the proposed amendments to the decree. The position of Michigan on that matter was set forth fully in our proposed amendments to that decree, and in the printed brief we filed in support of those proposed amendments.

In the main case it was shown clearly that there were two ship channels down Green Bay at the time of the admission to the Union, one of which passed east and one west of Chamber's Island.

It will be the position of Michigan now, that there was no ship channel coming down the Menominee River. The charts in the case then and now will show that the usual sailing courses passed east and west of the island.

The determination of the court in its opinion was to the effect that the course passing west of Chamber's Island must be adopted as the boundary because possession of Chamber's Island by Wisconsin during that long period of time put a construction on the definition which did not permit anything but the adoption of the western channel. Michigan then took the position that the boundary line

after leaving the mouth of the Menominee River must pass in the shortest possible distance to the center of that ship channel, which would be the line on the chart showing the course passing down that channel. That question was presented at the time the decree was settled by the court and Michigan's version adopted.

The first course of the decree is on a line erected at right angles to the ship channel and scaled off of a chart which was in evidence in the case and is substantially correct. (Defendant during the hearings before the Master conceded that this first course is three-eighths of a mile too long.)

The second course is taken directly off the chart. The course printed on the chart is given with a southerly trend and the language of the decree is in the reverse.

The third course is northeast and the word "by" was inadvertently included in the language of the decree. The chart in evidence in the case shows the course passing from that point through the Rock Island passage. Eliminating the word "by" reconciles the discrepancy. It is perfectly clear what the intent was. Therefore, it is the position of Michigan that elimination of the word "by," and a survey of Sugar Island, is all that is necessary. All other matters in issue between the parties have already been determined by the court.

GENERAL OBJECTIONS BY THE DEFENDANT TO ALL TESTIMONY HERE ENTERED ARE AS FOLLOWS:

1. Defendant objects to any testimony on the ground that the pleadings do not establish any right to relief, except as the defendant consents to the correction of the

decree, by eliminating the typographical error the word "by" from the erroneous course in the description of the boundary in Green Bay, and to a survey and definition of the land known as Sugar Island.

2. Defendant objects to any testimony on the ground that the allegations of the bill of complaint sought to be supported by such testimony are res judicata between the parties and such testimony is, therefore, immaterial.

3. Defendant objects to any testimony on the ground that the plaintiff has not laid a basis for any relief to be granted by this court on the bill of complaint filed more than five years after the decree complained of and that any proof of facts known to this court at the time of the entry of its decree is improper until such time as it shall sufficiently appear that the court was misinformed as to some material fact.

SPECIAL MASTER: You may make the entry, Mr. Reporter, that by consent of counsel this objection to the taking of any testimony in behalf of the plaintiff may stand as to each and every question asked and every item of evidence offered, and to all exhibits, as though repeated at the introduction of the evidence.

ROBERT M. REISER, being duly sworn, testified:

I am a member of the Bar of the United States Supreme Court, I was Special Counsel in the main case between Wisconsin and Michigan in which a decision was handed down in February, 1926. The decree was entered in November of that same year.

Between the date of the decision and the entry of the decree there were I think several conferences. I know of

one particularly before going to Washington and one at Washington.

Before we went to Washington we went down the Menomiee River. Mr. Sawyer and I were along and there were four or five of us, some engineers. That trip was made in an effort to see whether we could agree on what were islands and what were not islands and to define our decree above and below Quinnesec Falls and to assigns islands properly to the states to which they were to belong.

It was not my position at that time that Sugar Island was Michigan mainland and it never was except as it related to discussions between counsel with the idea of compromise on the ultimate decree, but that thought was rather negatived by the evidence of the record. There was evidence, however, on the Michigan side that indicated that Sugar Island might not have been an island at all times.

We did not proceed into the waters of Green Bay at that time. We may have been out at the ship entrance there but not with the idea of discussing or agreeing on that definition.

I can't recall that the line in Green Bay was discussed at all at that time. Mr. Sawyer and I did not agree on the line in the Menominee River entirely. We did not agree in regard to Sugar Island. I finally moved for entry of the decree pursuant to my thought of where the line should be, according to our construction of the opinion.

I think we were in Washington Tuesday, November 16th, and Wednesday, November 17th, 1926. I have checked on my expense account and that seems to confirm that. I am not sure that Tuesday is the day the argument was set on the motion. My impression is that is true. I think the reason that Tuesday was fixed for the meeting

was Mr. Justice Sutherland wanted a conference on the framing of that decree in view of the fact that we disagreed on what the phraseology should be. We had such a conference and I would say it was Tuesday, November 16th, within a day one way or the other. Mr. Sawyer was there and Mr. Ekern, who was then Attorney General of Wisconsin, and my impression Mr. Dougherty the Attorney General for Michigan or whether it was Mr. Mosier, I don't know now.

I would not say Mr. Justice Sutherland suggested the wording of the decree as it now is. I mean that he didn't hand us a paper, that this ought to be the decree or anything like that. The form of the decree was discussed. When we came into his chambers, the representatives of Wisconsin and Michigan, whoever they were, we discussed in general the conditions, and either Mr. Sawyer pointed out, or somebody pointed out, that Sugar Island which had been under the jurisdiction of Michigan in all those years, and had been assessed and taxed by Michigan, and as to which there had been no claim made by Wisconsin, and upon which it was claimed that quite valuable improvements existed at that time, was claimed by operation of the opinion or the decision of the court to be turned over to Wisconsin, and Wisconsin, was making that claim, and that was exactly our claim from the opinion.

I made that claim by reason of the language of the decision. All of the islands below Quinnesec Falls.

The decision said that and we contended that was the line although we recognized the fact that Michigan had assessed and had certain authority over that island during that time. We had taken the position in the trial that the rights of the parties were determined on the basis of jurisdiction they had exercised over the particular area involved and we had not by way of formal claim or counter

claim made any claim to Sugar Island, but when the decision came out we felt that that being the wording of it, that island belonged to Wisconsin and when that claim was made and discussed it was not discussed very long.

Mr. Justice Sutherland said—and I am only stating in substance—but in a way the result of his statement was that if Wisconsin was making claim to something that they had not had prior to that time and it could not be adjusted that the court would have to reopen the case because it was the understanding of the court when it rendered its opinion that it was not intended to disturb any existing status so far as sovereignty was concerned in any part of that boundary; in other words it was going to leave the states where it found them and where they had recognized their sovereignty extended.

I don't think there was any evidence in the case showing that the island had been taxed until the filing of the application for decree by Michigan. Then as I recall it there were some exhibits attached in support of the Michigan motion, and there had been testimony indicating that Sugar Island was a part of Michigan and was in the Michigan survey. We had never taken any definite position that we had claimed sovereignty or jurisdiction over the island except only as it had been given to us by the provisions of the boundary definition that all islands below Quinnesec Falls should belong to Wisconsin. It was my impression that the decree awarding the island to Michigan did not disturb the possession of either state. That is based on the Michigan exhibit and the universal knowledge that Michigan had had that island. There was no question about that.

With respect to the line which emerges from the Menominee River there was discussion. Mr. Sawyer claimed

that the entrance to the Menominee River as it now appears is not the natural entrance, but was an artificial entrance created by dredging at some later date after our boundaries were defined, and that if we were insisting upon Sugar Island that they would have to insist upon the location of the boundary out of the Menominee River into Green Bay along the line followed by the original river. I don't think that was more than just discussed. I don't think it was discussed when Mr. Justice Sutherland was present.

My recollection of it was that right after he (Mr. Justice Sutherland) made the statement I spoke of a moment ago, that the parties should attempt to dispose of their differences, having in mind the intention of the Supreme Court to leave the exercise of jurisdiction just where it was, that we withdrew, but at least some time we had some discussion about the course of the boundary and as I recall it Mr. Sawyer produced either what had been an exhibit, or what had been prepared by him, or one of the survey maps, showing the line as he thought it ought to be from the moment of leaving the entrance of the Menominee River, in to Green Bay and through Green Bay. I have got a very hazy recollection about that today.

As to the present line as it now stands in the decree from the mouth of the Menominee River I think was prepared by Mr. Sawyer or we drew it upon Mr. Sawyer's statement. I recognized that Mr. Sawyer was very familiar with that region and with navigation terms. We did not have an engineer with us; and for that reason we relied quite largely on what he stated would be or was a proper delineation there. I have a recollection that in

some respect I tried to make a check-up on some of it, but my thought is that that was with respect to the definition of Sugar Island rather than the outer area.

The allegation that I called Mr. Hillis, City Engineer of Marinette, with respect to the description of Sugar Island, may very well be true.

The issue in the main case was a determination of whether it would be the western channel or the eastern channel in Green Bay.

Q. Was there any evidence in the case at all as to the precise course of the boundary line through the Green Bay section?

A. No, except as it would indicate—I will withdraw that. Not as to the precise line.

Both plaintiff and defendant submitted some charts as to the claims made by each side, but there was no evidence to indicate the precise line of the description. The line as it now appears in the decree I think was obtained primarily from Mr. Sawyer, on his statement that that was correct, and he based his information on the different maps that were referred to, to certain sailing courses or shipping courses that appeared on some government maps of the region, recent maps showing modern sailing courses within thirty years, not courses at the time of the Michigan Enabling Act.

Q. Well, do you mean that Mr. Sawyer advised you that the recognized boundary line between Michigan and Wisconsin in the Green Bay section was substantially as he outlined it?

A. I would not say that.

MR. SAWYER: If the court please, I object to that as leading. (Question read.)

A. I would not say that that was Mr. Sawyer's statement. The boundary line as shown was indicated upon the map that he had with him—was the one that he submitted as conforming to the calls of the boundary following the most usual ship channel in Green Bay. In other words, it was his interpretation of what that boundary should be with the exception, I would say, of that boundary from the mouth of the Menominee River out into Green Bay, and as to that he had a different thought, his idea being that there was no shipping into Green Bay from the Menominee River or from Green Bay into the Menominee River; and his contention was, I mean at that time, that this was open water in which Wisconsin had no jurisdiction, over which it had exercised no jurisdiction, and for that reason the line should be the shortest straight line, and that statement we accepted.

Q. Then I understand Mr. Sawyer made the statement that that line represented the boundary of where Wisconsin had exercised jurisdiction?

A. You are asking me to be specific on a matter that is rather old. If I may elaborate on that answer just a little further; the court had already instructed us, Mr. Bieberstein, to define a boundary which followed the boundary or which followed the territory over which each State had exercised jurisdiction previously. That was the court's instruction, so that we should agree upon that, and unless we did it would have to reopen the case. For that reason we went out in an effort to define such a boundary, and whether Mr. Sawyer said "in this area" or "this part of the Bay, Wisconsin exercised no jurisdiction but here they did," I would not say, and I don't think he did, but I think each party, at least I went into the conference with the thought that we would

settle upon that basis, and when the definition was given I assumed that was the result we had arrived at; and another reason for feeling that way about it now is the fact that there was no evidence directly in the record as to any ancient rights or authority rights being exercised in the triangular area outside of the Menominee mouth. I would not say Mr. Sawyer said Wisconsin exercised no jurisdiction in there and Michigan did.

Q. Did you have any information as to what point Wisconsin exercised jurisdiction?

A. There was no evidence in the record at that time, and there was none available at that time.

Q. Did you have any other information in addition?

A. No, I had none.

Q. You had no personal information?

A. No; and nothing that I recall that was said.

Q. You feel Mr. Sawyer did?

A. I feel now that he did. I did not at that time.

Q. Mr. Sawyer lives in that neighborhood?

A. Yes, he lives right at Menominee within a stone's throw of this area.

"Plaintiff's Exhibit 1 was prepared in my office before the argument of the main case to illustrate to the court the issue as to this particular area."

Q. Did you at any time throughout the case ever contend that the boundary line was any other line except the straight line from a point west of Chamber's Island to the Menominee River?

A. A line followed by shipping, whatever that might be. I can't tell you now.

Robert M. Hasse (Continuing)

I don't think there was ever any claim made by either side during the trial that that line should follow the descrip-

tion given in the decree. That was arrived at in view of Mr. Sawyer's explanation.

It was my impression that the first course defined in the decree from the mouth of the Menominee River to its intersection with the shipping course up Green Bay and thence north in Green Bay conformed to the Judge's instructions. At least to this extent that there had been no exercise of jurisdiction by Wisconsin above that line, or sovereignty, or recognition of sovereignty. That was my impression that that was the fact. In other words, the record showed that was the situation as it stood at that time. I mean in the record of the trial of the case there had been no evidence to the contrary. I had no information at all on it. We assumed from Mr. Sawyer's definition of this part of the decree that that conformed to the instructions of the court, that sovereignty was to remain as it had prior to commencement of the action.

I imagine both of us dictated that draft. I think we made a few corrections in the proposed printed draft that we had and then had a stenographer copy it or we may have dictated. I think it was done by one of Mr. Justice Sutherland's clerks but I am not positive of that. It was done in the absence of Mr. Justice Sutherland.

I knew a little about nautical terms but not as much as Mr. Sawyer.

I don't think either side made any claim during the trial as to the boundary line emerging from the Menominee River and up to the time of the conference on the decree. It was our claim after the announcement of the decision that the proper course of this boundary was so uncertain that a survey should be made of this entire section, but Michigan did not feel that it could justify that expense and this decree was an effort to avoid that expense.

I had no information as to the precise location of the center of the channel. There never was any evidence as to any precise location of any given channel, except, I would say, right at Rock Island.

I had no information as to the length of a line from one change of course to the next change of course.

The length of the first course in the decree from the Menominee River was obtained from Mr. Sawyer. My impression was he stated it was obtained from an engineer, I think a Mr. Hasley who was City Engineer of the City of Menominee.

CROSS EXAMINATION BY MR. SAWYER:

(Defendant offered in evidence as Exhibit A a duplicate of Plaintiff's Exhibit 115 of the main case, being a chart of the western shore of Lake Michigan and Green Bay, being the same government chart as Exhibit E reproduced in this record. On Exhibit A appear faint lead pencil lines in approximately the position of the red line on Exhibit E)

ROBERT M. REISER (continuing)

I recall such a map. There were numerous maps of this kind. This is the sort of map which Mr. Sawyer had at Washington on which the information procured from Mr. Hasley was found. That is my impression of it. There was a straight line with a course given on the other map where the pencil line is located on this map. At least I was advised of the course and distance. Whether it was there or not I don't know. My recollection of it is that there were two lines on it. One a line following the course

of the lines as they appear now on this exhibit a very faint lead pencil line and the other one converging to the mouth of the Menominee River from some other point, but I can't tell you which. It might have been the sailing course from Chamber's Island objective to Menominee, or it might have been a line drawn out straight, as against others which were drawn perpendicular from the other sailing course.

We were at that time discussing the triangular area of water. We had in the record those geodetic charts showing the sailing course and the reason there was a triangle in discussion was because of the sailing course shown on Exhibit A, Southwest three-eighths West, eleven miles. That was discussed.

EXAMINATION BY THE MASTER

Mr. Justice Sutherland's instructions were to follow as far as possible the line of jurisdiction that had been exercised. Out here in Green Bay we run into a lot of open water territory.

I am not positive there was no discussion of the exercise of jurisdiction at that conference of that triangular water area. My explanation for that is, Your Honor, that there was no evidence that come to my attention that that had been true until long after this decree was entered, and I did not argue it for that reason, and I assumed that there was not any jurisdiction exercised there because no one else mentioned it, so I assume it was not mentioned by either party. It was Mr. Sawyer's contention that there

was no shipping into the Menominee River at the time of the establishment of the boundary, and that was a fact that we had practically conceded; and there was also no evidence about fishing or exercise of jurisdiction, and that feature of it I don't think was discussed. I am not quite positive of that.

(Many of the witnesses refer to "red line' and "blue line" on Combined Exhibit 1. The latter exhibit is not reproduced. The parties stipulate and agree that the "red" and "blue" lines on Combiner Exhibit 1, are substantially in the position of the "red" and "blue" lines on the Map attached to the Master's Report marked "Exhibit A" therein, appearing opposite page 24 thereof)

ROBERT E. ELLSWORTH, produced as a witness in behalf of the defendant testified as follows:

I had been connected with the Michigan Conservation Department since 1908. In 1908 and 1909 I was connected with patrol work at times and in 1912 I went into the patrol service exclusively and became Captain of Patrol Boat No. 2. My work was to patrol Lake Michigan and Green Bay.

I have examined Combined Exhibit No. 1 and notice the red line passing out of the Menominee River and west of Chamber's Island and through Rock Island Passage.

The first general survey that I made of Green Bay was in 1912, with Michigan Patrol Boat No. 2. I didn't do any work particularly on the bay in that year or interview any Wisconsin fishermen, but made a determination as to what the boundary lines were, and from field notes that I have looked up recently and from the time I patrolled the boundary lines, I would say this red line (indicating red line

on Combined Exhibit 1) verifies my interpretation correctly.

This line would come about a mile, a mile and a quarter, or a mile off Boyer's Bluff. I generally used to say, coming down from the center of Lake Michigan, or from Manistique, to the boundary waters, we would come down to the center line of Lake Michigan, then through Rock Island Passage to a point a mile off Boyer's Bluff. That is what we considered the boundary line, but in actual patrol work we used to figure on being about a mile and a quarter off Boyer's Bluff, a little west, to the westward of the boundary; then setting a course for a point about two miles off Chamber's Island. I mean two miles west of Chamber's Island light, the light house on Chamber's Island, and then shift to the center of Green Bay opposite the Menominee River, measuring that from the Michigan shore about halfway. I don't know whether you have got this halfway between those two points or not, but it looks to be about like it. Then into the mouth of the Menominee River. Now, that was my interpretation of the boundary waters and that was what I attempted to enforce, although I will say that in this section of the waters we done very little work. (Referring to the section south and west of Chamber's Island.) We did run that several times. I don't recall having run across any fishermen or doing any particular work in that particular section of the water.

I continued to patrol after 1912 until September, 1927. We would come into this area about once a year. There were some years I didn't come up at all in that Green Bay section. We would remain several days, sometimes a week or ten days. The fishing sometimes wouldn't be very brisk. It would be late in the season. I was unable to get

to Green Bay in the early spring always or late in the fall because my busy seasons were in other portions of the water. During the first year there were other patrol boats operated by the state at the same time. I presume they went into the same waters.

I remember the incident of Mr. Goodmander. It was on I think July 15th or 16th of 1924. We came to Green Bay, down the north shore of Lake Michigan, left Manistique in the morning, and run to the boundary waters, and then through this line down to Boyer's Bluff, and I run across quite a few fishermen operating all along the coast line. I couldn't get near any of them. Some of them would drop their nets and run, whether right or wrong. I wanted to see those fishermen over there and so I went into Washington harbor and stayed there all night. It stormed while I was there and I couldn't get out. While I was in there I met a lot of Washington Island fishermen, and among the fishermen that came aboard Patrol Boat No. 1, that I had at that time, was Captain Goodmander, and he made a lot of inquiries as to our interpretation of the boundary line, and I explained to him how I understood it and interpreted it, and advised him if he was fishing along the boundary line the best thing he could do was take out a Michigan license. In fact, I done that in a good many cases. Before I left, I think on the 15th or 16th, he came aboard and paid me three hundred and fifteen dollars for a Michigan fishing license, and that took care of him.

He did not refer to the incident of another Michigan warden having boarded his boat and I didn't. It wasn't mentioned at the time. I knew at the time that Captain Leisner had been on his boat, but I didn't mention it, nor he didn't.

I was in the patrol service until September, 1927, and during that entire period I occasionally visited and patrolled these waters.

ON CROSS-EXAMINATION BY MR. BIEBERSTEIN:

My visits to this territory were approximately once a year. There was some years I didn't get up there. I think in 1925. I didn't always go in the fishing season, in the late fall or early sping. I did see a good many Wisconsin and Michigan fishermen. The reports were that there weren't so many violators fishing on our side of the water, except in the fall of the year, for whitefish, over around Bark River.

I made a determination of this line from the description as given in the Red Book, the Michigan Manual, where it describes the boundary. I never noticed the maps in the Michigan Manual.

(Referring to Plaintiff's Exhibit 2.) If I ever saw it I never paid any attention to it. The line on that map does not correspond with the line I just described. It is very indefinite to me. It comes out here pretty well (indicating). If it showed the continuation of the shore over here (indicating), the main shore, you could get more idea of what it is. It is plain to me it does not correspond with the red line.

(Referring to Plaintiffs Exhibits 3 and 4.) If I saw them I paid no attention to them. The lines there do not look like the red line. If I ever seen it I never studied it, because I had better maps to work with. Maps made by the United States Lake Survey. They were more definite.

(Referring to Plaintiff's Exhibits 5, 36 and 37.) Those lines do not correspond to the red line on Combined Exhibit 1. They are curved lines and the other isn't a curved line. They all look the same. Political subdivisions, or territories, or what? They must all have a meaning. The only thing that looks natural here is Isle Royale. It wasn't a sailor that made them maps.

I would not say those maps did not appear in the Michigan Red Book, but I did not observe them. I got my information by reading that part that describes the boundary. The Constitution itself, where it describes the state by metes and bounds.

I have never seen any official map anywhere with a line like this red line from the mouth of the Menominee River, marked East by South 7½ miles, and then up to the west of Chamber's Island, except one I made myself. I had charts on Michigan Patrol No. 1 outlining the boundary. I made that for the boat on which I was sailing.

Mr. Leisner was with me at times. I don't think I ever called his attention to the boundary on the charts. I don't think he was ever with me when I was down there. He used to go with me to Big Bay de Noc.

Q. As a matter of fact, you always considered the boundary line to be the dotted line marked Southwest ⅜ West, 11 miles, out of the mouth of the Menominee River, to a point two miles off Chamber's Island, did you not?

A. No, I didn't.

I always considered the boundary line was this line coming out here (indicating.) That is about where we would set our course, so we would clear this can buoy.

I have never seen a chart that had a course on it like that. My idea of where the boundary is, is based on my opinion of the description of Michigan, as given in the Red Book by metes and bounds. It described the entire state. It describes it by metes and bounds in a general way. It does not describe distances and angles. I laid down this boundary where I considered the boundary to be in my own interpretation only. I asked for information from the Secretary of State, from the Attorney General, and from the Commissioner of the State Game and Fish Preserve. This boundary is my own interpretation of the words: "thence down the center of the main channel of the Menominee River to the center of the most usual ship channel of Green Bay; thence to the middle of Lake Michigan."

I never thought that point ought to be halfway across between the Michigan shore over here (indicating point opposite Menominee River). I thought it should be the halfway point between Menominee River and Door County Peninsula. Before I got to Lake Michigan I took the Center of the most usual ship channel of Green Bay. I took the halfway point between Menominee and the Door County Peninsula and do not necessarily depart from that before I get north of Chamber's Island, but I don't take any halfway point north of Chamber's Island.

The distance of the first course from the mouth of the Menominee River, East by South, is considered about seven miles. I presume if I had access to some of my field notes it would give that.

I was in the patrol service until September, 1927, but I don't think I was in Green Bay in 1927. I can tell you the last year I was in Green Bay by referring to some

notes that I made. I am positive I was up there in 1924 and I think I was in 1925 or '26, but not in 1927.

I don't recall having told other Michigan wardens where I thought the boundary line was, and Mr. Leisner never worked for me when I was working on the boundary waters. I was not over him. They used to call me the Commodore, but I never had charge of but one vessel at a time, and when I went into the Green Bay country, around Big Bay de Noc and Little Bay de Noc, I usually got in touch with Mr. Leisner, because that was his home territory.

I never made any arrests of Wisconsin fishermen in Green Bay between the red and blue lines during all the time I was in the Service.

RE-DIRECT EXAMINATION BY MR. SAWYER:

I saw a good many Wisconsin fisherman run away when I was patrolling these boundary waters. I recall one time, a fisherman from Gill's Rock was in over the line, but when we approached him he apparently was broke down. He said he was and I believed him, and I put my engineer aboard and he repaired his difficulty and started him on his way.

He was in here, west of the blue line. He claimed he had been broke down and drifted off there, and I believed him, because he was actually out of business. He might have been fishing there. I don't know. He said he was broke down and I believed him.

When I was sent in there in 1912, it was soon after Michigan adopted the non-resident license law. I was sent in there for the purpose of cleaning up a lot of depredations that was being done.

When I asked for information as to what the interpretation of the Red Book was they would say that was my business. I was on the ground and it was up to me. I made a request to the Secretary of the State to determine just where that boundary line was.

Referring to these maps which Mr. Bieberstein showed me, Plaintiff's Exhibits 2 to 7, it would be pretty hard to locate the line on those maps. There are too many islands left out. It looks as though it was political subdivisions. I certainly could not locate it out there. In the patrol service that line would have no significance at all.

JOHN W. CORNELL produced as a witness on behalf of the plaintiff, testified as follows:

I am sixty-seven years old and have lived on Washington Island since I was eleven and have been engaged in fishing during all that time, and I have had one or more boats. With my sons I now own three and I am licensed to fish from both Michigan and Wisconsin. I have always had licenses in both states. I fish and have fished all the north end of Green Bay, and Lake Michigan from Kewaunee north and east to Charlevoix, Michigan, in east there.

Several times I heard others during the early part of my career on Green Bay discuss where the boundary line was located. This occurred almost every year, several times, since I can remember. My information as to where the boundary line was located was secured when I was a boy. My father was a fisherman and my uncle, all old heads, and I asked them where the boundary line was between the two states and they said it was half way over. Even Michigan fishermen said it was that. I never knew of any disagreement about it. All agreed to it. I am fa-

miliar with where the boundary line was generally regarded to be. It was north and west of Chambers Island. I can't give you the course without figuring it off from this. (Referring to Combined Exhibit 1)

MR. SAWYER: I object to that as incompetent, irrelevant and immaterial.

That line was the blue line on Combined Exhibit 1, and going direct through there and within a mile I should judge, west of the Driscoll Shoal, which brings it half way between here and Bark River. That line is West of the Whalesback Shoal and proceeds up to about a mile west of Driscoll Shoal. It goes into Lake Michigan in a direct line. That point in the blue line is the gas buoy on St. Martin's Reef. That other buoy isn't on St. Martin's Reef.

I was born on Washington Island and from my earliest recollection there were a pile of sailing vessels on the lake. There were a few steam vessels, at least ninety per cent were sail and ten per cent power boats. I traveled on the Hart steamer from Green Bay when they were making their first trips. They came up to these ports on the east and to Menominee, Washington Island and Escanaba.

Boats that came from outside the bay came through the Door, Rock Island and Poverty Island passage. They proceeded down the bay different places. If they went to Sturgeon Bay or Green Bay some would go east of Chambers Island and some west of Chambers Island. I rode on one, a Buffalo boat, the "Rocket." That was about 60 years ago. I boarded that boat at Washington Harbor. It was bound for Green Bay. I couldn't tell exactly what course we followed. I know we went west of the Whalesback from Washington Island. I don't know whether

that was the regular course. I discussed the boundary line with a Michigan fisherman, Captain Pat C. Casey, I should judge, nearly forty-five years ago. He had a big lift of whitefish which he told me he got in the State of Wisconsin, in a laughing way, in the Driscoll Shoal.

MR. SAWYER: If the Court please, I would like to have an objection to this evidence as incompetent, irrelevant and hearsay.

ON CROSS EXAMINATION BY MR. SAWYER:

I never saw any Michigan game wardens in that area. They never came near me. They went by me. I have heard of the incidents where Michigan game wardens attempted to seize Wisconsin nets; of the Nicholson case where the game wardens pulled Nicholson off Chambers Island. I have heard of it but don't know anything about it. And I know of the incident when Mr. Goodmander was boarded by game wardens right over here. I have heard something about it. I don't know exactly where it was. There was a fight and it was within a mile or two of Washington Harbor.

I don't know as I ever heard the claim made by Michigan fishermen that the red line on Combined Exhibit 1 was the boundary line.

The red line on Combined Exhibit 1 follows the steamer course given on the marine charts for a vessel passing through Rock Island passage and then southerly west of Chamber's Island down to Creen Bay. A vessel would attempt to follow that line as near as possible. A sailing vessel would take the side that gave it the most room. They would take the side where the waters were the wid-

est. It would be the objective point that I would be figuring on, and I would go one side or the other to get to that objective point. These points where you change your course, the charted steamer course or sailing courses, are commonly called sailing objectives. For instance, the sailing objective off Chamber's Island and the sailing objective off Boyer's Bluff, the object would be to lay your course between these two points to go the shortest possible way to the objective. A straight line between the points certainly might be called the center of the channel.

ALBERT T. GOODMANDER produced as a witness on behalf of the plaintiff, testified as follows:

I am fifty-two years old and have been a fisherman out of Washington Harbor on Washington Island for about thirty-two years. I am now licensed to fish by both the State of Michigan and the State of Wisconsin.

I know that there is a generally reputed and accepted boundary line in the waters of Green Bay between the states of Michigan and Wisconsin, and I know where it is. The information has been handed down from the oldest fishermen that is around here ever since boundary lines has been talked about. It comes from east. We have always figured on that as always heard that it is about halfway in between St. Martins giving Boyer's Bluff a good berth, about half-way to the Driscoll or a little more, and then shifting your course down westward to the Whalesback, or half-way to the mainland and then out off the mouth of the Menominee River and then into Menominee. That line passes west of the Whalesback Shoal.

I had an encounter with the Michigan game wardens about nine years ago. I was way over on the west shore.

The patrol was coming from Escanaba on that course, most likely going to Menominee. We didn't have the money and we wasn't able to buy the license, and we were on the lookout and we seen this boat coming and we started out and they took after us and they overtook us a long ways out. They were speedier than we were. They overtook us way west of the line I just described. They put a line on us from our timberhead to their handrail. It wasn't very comfortable for us. They were too fast for us. We gave them a good tug of war. We cut the line once and the boats parted. About the time the boats parted one of the wardens was just about ready for war, and he jumped aboard of the our boat with a windlass bar, and I had a knife. I didn't go into the cabin so he could have got in there. About that time Mr. Leisner's hat blew off and he cooled off some.

We were at least an hour from the Bluff, about nine miles from Washington Harbor, when the patrol boat took him off again.

I applied for a Michigan license and I was not prosecuted.

Again in December, 1930, I was arrested in Michigan and Pleaded guilty and paid a fine of fifty dollars. I was charged with fishing for whitefish out of season.

STANLEY VOIGHT produced as a witness on behalf of the plaintiff, testified as follows:

I have been fishing ever since I was sixteen years old, out of Gill's Rock. We fished the north end of Green Bay, from Chamber's Island north. We were licensed to fish by both Wisconsin and Michigan, but I haven't had a Michigan license since 1929.

I know that there was a general reputation as to where the boundary line between the State of Michigan and the State of Wisconsin was located in Green Bay before 1923.

For one thing, there was a chart that showed, and it seemed that—well, the wardens, about where they patrolled you know, the Michigan wardens, where they patrolled. That seemed to go up north of Whalesback on the west side. My other source of information was a chart showing the line running north of the Whalesback. I don't see any line on here (referring to Combined Exhibit 1) that would correspond to the one I have. The chart I have I got from Washington, D. C., in 1910 or 1911.

ON CROSS EXAMINATION BY MR. SAWYER:

There were Michigan wardens patrolling out there. I know there was one once, because they were after us. We were northeast of Whalesback. I believe we had a Michigan license at that time. I have heard of other instances where wardens chased Washington Island fishermen.

I know where the steamer course is from Chamber's Island to Boyer's Bluff and I know the wardens were out there. I didn't think the wardens claimed that the Whalesback was in Michigan. The steamer course passes probably one-half mile this side. (The east side of Whaleback)

EMIL NELSON produced as a witness on behalf of the plaintiff, testified as follows:

I am fifty-two years old and live at Ellison Bay. I have fished all my life. I have had licenses from both Michigan and Wisconsin. While I had the Michigan li-

cense I fished both in Michigan and Wisconsin. I fished in lower Michigan and upper Michigan here down toward Escanaba and Ford River, over to Cedar River, across that way.

When I had no Michigan license I fished over there then too but not after. They had me arrested before I knew you needed separate licenses. I was arrested by Mr. Bedell. I was pretty well over toward Cedar River at the time on the west shore. That was twenty-four years ago. Bedell claimed that the line went West of the Whalesback and went down from the north of Chambers Island.

MR. SAWYER: I think I ought to have an objection that that is within the knowledge of a deceased agent, a party to the case.

SPECIAL MASTER: The record may show that it is conceded that the officer with whom the witness had the conversation is now deceased.

Quite a few years ago I saw markings on the buoy on the Whalesback Shoal. There used to be a Wisconsin seal on the buoy when I first fished. That is the red buoy on the east side of the shoal. It must be 25 years ago or so. It was quite a while ago since I last saw it there. We never used to go very close because it is out of our way to go up to it because we always run either one side or the other of the shoal so we generally get pretty far away from it.

I have talked to Michigan wardens three different times. They have been aboard my boat three different times. The first time was the time they had me arrested. Then they have been on the boat since that, since I had a license. I was four or five miles out of Cedar River at that

time, about east. It is about eight miles from the Whalesback into the Cedar River.

VICTOR JOHNSON produced as a witness on behalf of the plaintiff, testified as follows:

I am fifty-four years old and fish out of Ellison Bay. I fished for myself for eighteen years or nineteen years. Altogether about thirty years or more. We fished quite a ways out.

I did not have a Michigan fishing license during any of that time.

When we started to fish there we were quite a ways out and a Michigan game warden came up with a boat. It was Patrol Boat No. 1. That must be eighteen or nineteen years ago. He came on our boat. We were about seven miles northwest of Boyer's Bluff, about fifteen miles from Gill's Rock. He came on board and asked us where we thought the line was. Of course, we didn't—it was pretty hard to say where the line was, but we told him, we thought we see a fishing boat about 1½ miles outside of us, and we told him that was just about where the line went, and what we had heard, then towards Rock Island, between Rock Island and St. Martins, just half ways. He said, "Well, that is just about where it goes."

MR. SAWYER: I want to get into the record a motion to strike this out and the objection that it is hearsay. We don't know who the warden was, whether he is living or dead. It is incompetent, irrelevant and immaterial, anyway.

After that we played pretty safe.

I didn't hear the claim many years ago that the steamer's course from Chambers Island to opposite Boy-

er's Bluff, a mile off Boyer's Bluff, was the claim of Michigon wardens to be the boundary line. It is only the last two or three years; two years, I guess.

JAMES PEDERSEN produced as a witness on behalf of the plaintiff, testified as follows:

I am sixty-three years old and am a fish dealer and have been for the last thirty years. Before that I was a lumber shover in the summer and fished in the winter.

I was arrested for fishing in Michigan waters about thirty-five or thirty-six years ago by a Michigan game warden. I was fishing between Chamber's Island and the Michigan shore, about half-way. I did plead guilty. I don't know what they did. I had two lawyers and I won the case before Judge Hastings. He was a Wisconsin judge. All I can tell you is that we won the case and he returned my property.

ANDREW CORNELL produced as a witness on behalf of the plaintiff and testified as follows:

I am forty-nine years old and lived on Washington Island since I was four. I have been a fisherman since I was sixteen. I am licensed by Wisconsin. I don't have a Michigan license myself but I run a boat for my brother on shares.

I never saw the Michigan game wardens in the area between the red and blue lines on Combined Exhibit 1, but I have heard about the incidents where the Michigan game wardens chased Wisconsin fishermen and seized their nets, and other instances when they chased them and didn't catch them. I knew Michigan game wardens were patrol-

ling that water for a few years, the area between the red and blue lines on Combined Exhibit 1.

CLAUDE CORNELL produced as a witness on behalf of the plaintiff and testified as follows:

ON CROSS EXAMINATION BY MR. SAWYER:

I have heard these stories about Michigan patrol boats chasing Island fishermen. That would apply to that area there between the red and the blue lines on the map. The Michigan patrol boats have chased Wisconsin fishermen out of those waters repeatedly.

ON REDIRECT EXAMINATION:

That was recently about two or three years ago.

ON RECROSS EXAMINATION:

I also heard of the instances where they were chased out years ago.

WILLIAM CORNELL produced as a witness on behalf of the plaintiff and testified as follows:

I am forty-two years old and have lived on Washington Island all my life. I have been a fisherman ever since I was old enough to work. We have both Wisconsin and Michigan licenses for our boat.

I have heard the stories of the Michigan wardens patrolling and chasing some of the fishermen. The so-called Nicholson incident and the so-called Goodmander incident.

If I am informed right the Goodmander incident was in Michigan waters.

Q. What you admit was Michigan waters?
A. It was on the west shore. That is what I have heard, anyway I don't know anything about it.
Q. But you heard of it; and you knew that the Michigan wardens were patrolling that water?
A. Yes, sir.
Q. And a good many of your fishermen here had Michigan licenses because of that?
A. During that time; yes, sir.

LAWRENCE VOIGHT produced as a witness on behalf of the plaintiff and testified as follows:

I am forty-four years old and live at Gill's Rock and have been fishing since I was able to work. We are licensed by Wisconsin and had a Michigan license until a few years back.

Q. Do you know whether or not there was a general reputation as to where the boundary line between the State of Michigan and the State of Wisconsin was located prior to 1923?
A. Well, we always claimed it ran up north of the Whalesback and took a big circle down there. Even the Michigan wardens claimed it ran there. My information was a chart that I had. I got it from Washington, D. C. Also in 1910, 1911 the wardens came up to a fellow out there, and it was way up in there, and they told him the line ran in that direction.

ON CROSS EXAMINATION BY MR. SAWYER:

I have heard of the incidents of the Michigan game wardens chasing Island fishermen; the Nicholson case and the Goodmander case. We heard Michigan wardens were claiming the steamer course two miles west of Chamber's Island to the objective off Boyer's Bluff as the boundary. We knew that was what was claimed, at the time, and they chased our fishermen out of there. That is the red line on this Exhibit and that is what the wardens claimed as the boundary, but I don't think they ever patrolled that. I never saw them.

ON RE-DIRECT EXAMINATION:

I never talked to any of the Michigan wardens. Whalesback Shoel buoy used to be marked "Wisconsin." I saw it myself, probably about 1910, or maybe it was before that. I saw it once or twice, as we hardly ever go up to the gas buoy so you can see the marks on it. We don't run close enough to it. I don't know if it is still there. I haven't been up to that gas buoy for many years.

CARL G. RICHTER produced as a witness on behalf of the plaintiff and testified as follows:

I am a mail carrier and have been two years, but before that my business was fishing, for about forty years. I am sixty-two.

ON CROSS EXAMINATION BY MR. SAWYER:

I have lived here practically all my life and I have heard of Michigan game wardens chasing these men, Nich-

olson, and about the time that Mr. Goodmander went away with the game warden.

I know the Michigan game wardens claimed the red line on Combined Exhibit 1, from a point opposite Chamber's Island to the objective off Boyer's Bluff as the boundary, and the Michigan boats were out there patrolling that water, claiming that was Michigan water.

ON REDIRECT EXAMINATION:

I couldn't say when the wardens were patrolling. '20-'26, wasn't it? As near as I can remember it was 1926 when the Michigan game wardens contended that that was the line. I wasn't there. I didn't see them, but I heard they were there.

ERNEST ELLEFSON produced as a witness on behalf of the plaintiff and testified as follows:

I am thirty-eight years old and live on Washington Island. I am engaged in commercial fishing for myself and have been for fourteen years, and then I fished with my dad ever since I was fourteen up until then. We fish out of Washington Harbor in Green Bay, about due west from the island.

The only generally accepted and reputed line at the time I began to fish was, what I heard the older fishermen talk about. I heard two different ones as far as the passage by Rock Island and St. Martin's is concerned. Otherwise all I heard was about half and half down the Bay. I have heard them say through Rock Island, and I have heard them say through St. Martin's. Those older fishermen described the boundary line as both Rock Island

and St. Martin's passage. From there it went through the middle and down, they figured, passing to the west of Whalesback Shoal.

I had a Michigan license six years, the last being two years ago.

ON CROSS EXAMINATION BY MR. SAWYER:

I have heard the stories about the Michigan patrol boats chasing Island fishermen and know that the Michigan authorities were claiming that that was Michigan water. As to this area between the red and blue lines (Combined Exhibit 1) that was water our Island fishermen claimed was Wisconsin and Michigan authorities claimed it was Michigan. If we could get away without licenses, we did, and if we couldn't we got licenses. I was never molested by patrol boats with Michigan wardens.

MIKE ZETTEL produced as a witness on behalf of the defendant, testified as follows:

I live in Cedar River on the west shore of Green Bay, about thirty-five miles north of Menominee. I have been engaged in fishing for the past forty-two years. It was mostly all pound net fishing until late years.

The red line on Combined Exhibit 1 which is the course marked on the chart Northeast ⅞ East, 27 miles, is the line up to which the Michigan wardens patrolled. I have seen them chasing Wisconsin fishermen in there more than once.

I can describe one incident. I was fishing out there, north of Whaleback. The patrol boat was coming along the steamer channel, the one I just testified to, and there were boats off in here near the red line, and they simply

disappeared off into Wisconsin waters. I saw the patrol boat take after them and they ran for the Wisconsin line. I saw this several times.

ON CROSS EXAMINATION BY MR. BIEBERSTEIN:

Up until twelve years ago, I fished pound nets off Cedar River all the way from eighteen to sixty-five feet of water. I always hugged the west shore until twelve years ago. The incident of the patrol boat chasing the other boat was last summer. About two years ago was the other time I saw those patrol boats there. I saw patrol boats along the red line crossing up and down before 1926. I did not see them stop anybody. I wasn't out that way. I never fished between the red and blue lines before 1926.

ON REDIRECT EXAMINATION BY MR. SAWYER:

I made a mistake. I did fish in that vicinity about twelve years ago.

ON RECROSS EXAMINATION BY MR. BIEBERSTEIN:

The reason that Wisconsin and Michigan fishermen were both at the Whalesback Shoal is that the line ran right through there.

ON REDIRECT EXAMINATION:

According to my figures the boundary line went a mile and a half east of the gas buoy on the Whalesback.

NAT BAILEY produced as a witness on behalf of the defendant and testified as follows:

I live in Ingallston, and in the City of Menominee in the winter. I lived in this vicinity all my life. My business and my father's business is fishing. I am fifty-eight years old.

I have seen Michigan wardens go through with patrol boats. I don't know exactly where they were patrolling, but I figured they were near the line, near the steamboat channel, that is the way we located it, patrol boats going through near the boundary line.

ON CROSS EXAMINATION BY MR. BIEBERSTEIN:

I never fished east of the Whalesback and don't know who did fish between the blue line and the red line around the Whalesback.

ED PERSON produced as a witness on behalf of the defendant and testified as follows:

I live in Escanaba, but I formerly lived in Menekaune or East Marinette. That was back before the war, and I was fishing with my Dad under a Wisconsin license. That was about 1912.

I knew at that time the Michigan wardens were patrolling the line from the Menominee light to Chamber's Island and to Boyer's Bluff. They came along the steamboat course right up from Menominee. It was common knowledge that you couldn't set nets north and west of this red line from Chamber's Island and Boyer's Bluff. We figured if we did we was on Michigan water.

ON CROSS EXAMINATION BY MR. BIEBERSTEIN:

The dotted line from the mouth of the Menominee River to the point west of Chamber's Island, marked "SW ¼ West 11 miles," was supposed to be the boundary.

ON REDIRECT EXAMINATION:

I saw the patrol boat, the Charles Osborne, patrol between Chamber's Island and Menominee. We used to see them in the fall of the year. I know they regularly patrolled between Chamber's Island and Boyer's Bluff, but I couldn't say between Chamber's Island and Menominee because, you know, once in a while they run up to Menominee. They were always watching in these waters (indicating between red and blue lines).

CHARLES BAILEY produced as a witness on behalf of the defendant and testified as follows:

I live in Arthur Bay; am sixty-five years old, and my business is fishing. I have been fishing for fifty years in the same vicinity. My father was a fisherman before me.

The red line on Combined Exhibit 1, from a point two miles west of Chamber's Island, Northeast ⅞ East, 27 miles, to Boyer's Bluff, is the steamer course. The Michigan game warden's boats patrolled that line.

Q. Over a long period of years?
A. The Osborne was through here; I remember the Charles Osborne patrolled in through there.

Referring to the portion of the red line south of Chamber's Island and West into the Menominee River, there has always been a dispute in there because Wisconsin men would get on our side and our Michigan men wouldn't know where to pinch them. They didn't know where the line was themselves.

ON CROSS EXAMINATION BY MR. BIEBERSTEIN:

Before 1926 I never went out beyond seventy feet. That wouldn't carry me more than halfway to Chamber's Island from Arthur Bay. As to the line between Chamber's Island and the mouth of the Menominee, the dotted line on the chart, I remember there was a steamboat map, but as I understood, they took the course out of the river here at a certain distance. I heard the claim that this red line, south by east, seven and one-half miles, and then up to a point west of Chambers Island, was the boundary, in later years, not before 1926. Of course, I, being up in this part of the country, I never heard any argument or uncertainty about the line from Chamber's Island to Boyer's Bluff until this year, it was, that they wanted to get it down and take the Whalesback out. That is the only uncertainty I ever heard of. The last eight or nine years the triangular area has been disputed. Before that I couldn't say. I had no occasion to fish in there and I never did.

JOHN BARSTOW produced as a witness on behalf of the defendant and testified as follows:

I am forty-one years old and live at Fox, about seven miles north of Cedar River. I have fished in this area practically all my life.

The red line on Combined Exhibit 1, the steamboat channel from Chamber's Island to Boyer's Bluff is the line that was considered as the boundary. That area was patrolled by Michigan wardens. I have seen them patrolling out there when I was out there fishing, and I have seen Michigan wardens chasing Wisconsin fishermen out there.

I have seen Wisconsin fishermen there several times. Some had licenses and some had not. I have seen their nets out there, some with license tags and some without.

ON CROSS EXAMINATION BY MR. BIEBERSTEIN:

Q. You didn't see any of those Michigan patrol boats out there before six or seven years ago, did you?
A. I don't know before six or seven years ago, but we used to see them, and the nets were set, instead of pound nets, gill nets in Wisconsin.
Q. Well, you didn't see the Michigan patrol boats way over there on that steamer course seven or eight years ago?
A. They didn't have to be over there. We saw them on this side.
Q. You didn't see them on that red line?
A. They were chasing them off.
Q. They were chasing them off the west shore?
A. Yes.
Q. They were quite close to the west shore, too, weren't they?
A. Sometimes they were.

OSCAR E. OLSON produced as a witness on behalf of the plaintiff, and testified as follows:

I am forty-three years old and live in Marinette, Wisconsin. I have been engaged in commercial fishing practically all my life; twenty-five years for myself. We always regarded the boundary before 1926 as halfway between Chamber's Island and the shore.

I knew of the boundary lawsuit going on for the last eight or ten years, and read about it in the papers, and have been interested since the decree of 1926. Before the announcement of that decree Menekaunee fishermen were

sometimes fishing right up to the Michigan shore. There were some that had Michigan licenses.

I don't know about the Michigan wardens patrolling those waters, but I did hear of the Nicholson case where a Michigan warden was put ashore on Chamber's Island.

Menekaune fishermen have been particularly interested in this second suit being brought by Wisconsin against Michigan. Since the Ann Arbor carferry established all-winter service into Menominee, fishermen from Menekaune are hemmed in by an open channel in the ice, and have to come over on the Michigan side to get out on the ice. This has been the condition for the last eight or nine years.

FRANK F. SEIDL produced as a witness on behalf of the plaintiff and testified as follows:

I am fifty-seven years old and am a fish dealer residing in Michigan with my place of business in Marinette, Wisconsin. I have been a resident of Menominee 57 years. I operate fishing boats of my own and have for over thirty years, all over Green Bay and the northern end of Lake Michigan.

ON CROSS EXAMINATION BY MR. SAWYER:

I am familiar with the number of fishermen and the amount of fishing that is done in the triangular area. There are probably eight or nine boats fishing out there. That is, eight or nine Wisconsin boats fishing in there in the summer time. The difference in the licenses for Michigan and for Wisconsin would be thirty-five to fifty dollars a boat; probably three men on each boat. Over twenty to twenty-five Menekaune fishermen fish in there in the

summer time. A lot of smaller boats fish out east of Green Bay, over toward Horseshoe Bay, Fish Creek and Egg Harbor. In the winter time there are a couple of hundred. If they were to fish through the ice in Michigan territory they would have to pay for a minimum license of one hundred dollars each.

LAWRENCE HANSON produced as a witness on behalf of the plaintiff, testified as follows:

I am forty-two years old and live in Marinette, Wisconsin. My business has been sailing and fishing.

I have fished near the dotted line marked Southwest ⅜ West, 11 miles, on Combined Exhibit 1. In the winter time there were a couple of hundred Wisconsin fishermen in that area. I met one Michigan fisherman in that area twenty years ago, I guess.

ON CROSS EXAMINATION BY MR. SAWYER:

This couple of hundred fishermen out in this area is just recently, within the last ten years. Before that there were not so many. There have always been some.

HERMAN LEISNER produced as a witness on behalf of the defendant, testified as follows:

My home is in Escanaba. I am sixty-five years old and am a Michigan Conservation officer. I have been connected with the department since March 1, 1911. My duties are to enforce game and fishing laws. At one time I had the whole upper peninsula, but I am working just in Delta County now. My residence was in Escanaba all the time.

Referring to Combined Exhibit 1, the chart shows the

county line on it right here (indicating) and it shows the south line of Delta County and the City of Escanaba.

I have been on patrol boats in connection with my duties. Many a time when a patrol boat came in this district I worked on the boat. At one time the State had four patrol boats. At one time I had a small boat myself. Larger boats traveled from one area in the state to another and would remain in a given district only a short period. When they came in my district they would pick me up. I traveled on boats from 1911 to 1930.

I would be out there probably three times a season, from three to six days at a time. They used to come, say in June, September and October.

We would come out of Escanaba and come here to Boyer's Bluff and pick up this red line, and follow that down, which we considered our boundary line between Michigan and Wisconsin. That line is on the Government charts, but it is not marked in red on the Government charts. It is a dotted lie indicating a deep water channel; most used steamboat channel. We would come down from Boyer's Bluff into the Menominee Pier. I didn't pay any attention to the waters between Chamber's Island and the Menominee Pier. I didn't know how far the line was out there.

When we were out there we were under instructions from the Department, attempting to enforce law in the region, but we never had an experience down here. The line is two miles east of the Whalesback Shoal that we were patrolling on. Generally, when we came along any fishing boats out in this territory north and northwest of there, they would see us and recognize us within eight or ten miles and they generally would pull stakes and go for the island. We very seldom could overtake them,

except the Wisconsin boats that had a license. They, of course, stayed right on their grounds. I mean Wisconsin boats that had Michigan licenses. We used to have a good many of the fishermen from Marinette and Washington Island having a Michigan license fishing in these waters.

I don't know what proportion were violators and what proportion were not. We had several encounters with them. We picked up some nets that were unlawfully set and were not properly marked.

I have checked the records of my department as to the number of non-resident licenses issued in this district in 1928 and the amount involved. The amount of money the State received for 1928 was $9,345.00; for 1933 it was $2,585.00. In 1928 there were thirty-nine non-resident commercial fishing licenses sold by the State, of which twenty-one were for operations in Green Bay. In 1933 there were twelve licenses, one of which was from Marinette and two from Washington Island, which makes three that operate in these waters.

ON CROSS EXAMINATION BY MR. BIEBERSTEIN:

At the time I saw Goodmander, he was north and west of the blue line.

Q. I call your attention to the red line from a point two miles west of Chambers Island to the objective north of Boyer's Bluff, that you said was considered to be the boundary line.

A. Yes, sir.

Q. Before 1926 this line from west of Chambers Island to the mouth of the Menominee River was considered just as much the boundary line as this other line?

A. We considered it the boundary.

Q. You never heard of the dotted line ont of the Menominee River east as a boundary line?
A. We never patrolled it.
Q. No one ever told you that was the boundary line?
A. Never patrolled it.
Q. I say no one ever told you that was the boundary line?
A. No.

ON REDIRECT EXAMINATION BY MR. SAWYER:

I didn't know anything about that triangle. I didn't have anything to do with it.

ON RECROSS EXAMINATION BY MR. BIEBERSTEIN:

Q. But everybody, it was generally accepted, and you did too, didn't you, Mr. Leisner, that the boundary was the steamer course west of Chambers Island to the Menominee River?
A. That is what I took it for.

THOMAS R. HASLEY produced as a witness on behalf of the defendant, testified as follows:

I am City Engineer of the City of Menominee and have lived here since 1898.

Exhibit E is a chart of the north end of Green Bay. I laid off on that exhibit the red line on the course East by South. The course was given to me by Mr. Sawyer and I laid it off on the chart from the radius. The figures given there are accurate. Seven and one-half miles from land and seven and one-eighth miles from pier head, but I didn't draw the line to the point on the land. It would

be seven and one-half miles in a straight continuation to the pier head and the continuing on to the Main Land.

ON CROSS EXAMINATION BY MR. BIEBERSTEIN:

The line shows two distances, one of 7½ miles from land, and one 7⅛ miles from the end of the piers. Mr. Sawyer gave me that. I scaled it off myself, but I didn't measure it out on the ground or in the water. That information was also given me from another map given me by Mr. Sawyer. I didn't measure that.

JOSEPH HORNICK produced as a witness on behalf of the defendant, testified as follows:

I live in Menominee and am a Conservation Officer for the State of Michigan. I commenced work on March 1, 1927.

Some time in 1929 I received instructions to enforce the Michigan fishing license laws in Green Bay, and that winter there wasn't any good ice until the latter part of January, 1930. Then the East Marinette fishermen started fishing out there, and Captain Allards came here himself and I met him at the hotel with another Conservation officer. We went out there in this area and there were a lot of East Marinette fishermen there and they did not have licenses from either Michigan or Wisconsin. We warned them to get out of the territory, which they did. After that they got in touch with some attorney the following day and after that I was told to hold off awhile, that it had been agreed no action would be taken pending suit.

From March 1, 1927 to 1930 I didn't have the lines. Nobody told me to do anything. I did find out later on that

there were Wisconsin fishermen there in the winter of 1928 and 1929.

JAMES PEDERSEN produced as a witness on behalf of the plaintiff, testified as follows:

Twenty-five or thirty years ago I had some nets picked up by the Michigan wardens. I brought an action in the Circuit Court of Marinette County for the recovery of those nets. I was the plaintiff in one of those actions.

I was not arrested in Michigan. I employed attorneys in Marinette and the case was brought before a jury in the Circuit Court there. I claimed those nets were in Wisconsin east of the blue line and the Michigan wardens claimed the red line here was the boundary. I said about two miles from Chambers Island west. My witnesses testified that my nets were inside of that line. The case was tried before the jury and the jury found in my favor. There were two other men involved in that case, one was Mr. Seidl. I don't recollect who the other one was. I got all my nets back. I personally set the nets that were seized. I think they were about a mile from Chambers Island. It was right in the channel. We always set our chub nets in the channel. Those nets were 35 fathoms long, each net. We generally put thirty nets in a gang. I didn't say just a mile west of Chambers Island. I said from the channel. We started at the center of the steamboat channel and stretched from there right across the bay into the Michigan shore. That was thirty nets, end to end, not side by side. The game warden seized all of my nets.

My nets were 25 fathoms long and were in two gangs, 16 nets to a gang. They seized only a part of my nets. These nets were set East and West across the current. I couldn't tell you just now where Williams Point is. Ny-

lund's and Christensen's nets were placed in the same direction as mine East and West, but farther north. All three of us had our nets parallel to each other. Nylund's nets were 30 or 35 fathoms long. We all used them that long, 35-45. I was fishing on the ice at that time. Those nets were fastened end to end so that if you multiplied 35 fathom by the number of nets the total length of the gang nets would be determined.

FRANK F. SEIDL produced as a witness on behalf of the plaintiff testified as follows:

I remember the three actions brought by Mr. Nylund, Mr. Christensen and Mr. Pedersen in 1908 against the Michigan game wardens. I was interested in one of those cases. Mr. Nylund's interest was assigned to me and I was substituted as party plaintiff.

Referring to Defendant's Exhibit E, I never knew of a Williams Point in 1908.

There is no such name on the chart and it was never known to me as Williams Point. It was known to me as Williams Landing. I can show you pretty nearly where that is. It was called Williams Landing because there was two Williasm families in that vicinity about half a mile from one another. Between these two homes was a landing which they used to land rock and they called it Williams Landing instead of Williams Point. I have marked a cross with the letters "W. P." meaning Williams Point at that location.

Mr. Nylund's nets were I think 30 fathom long. He had two gangs, fifty nets altogether. I do not know whether they were 26-24 or 25-25. I don't remember. They were fastened end to end from the starting point where they

started to set through the ice. They went in a northwesterly direction toward the Michigan shore. If you multiply 30 by 6 you would get the number of feet and then multiply that by the number of nets in the gang, you would have the total length of the gangs.

ON CROSS EXAMINATION BY MR. SAWYER:

The gangs were set parallel. Roughly, there would be about a mile of nets.

ORIN W. ANGWALL produced as a witness on the part of the plaintiff, testified as follows:

I have been acquainted with navigation on Green Bay for 25 years or more. I navigated all the waters, Superior, Lake Ontario and all the Great Lakes. I had a Master's license on all the lakes, Superior, Ontario, Huron, Erie, Michigan, Detroit River, and St. Clair River. I have been navigating about twenty years or more, got license when I was 22 years old. I am as familiar with charts as the average. I can read a chart if given proper instruments and a point to start from, I can determine distances on Defendant's Exhibit E.

MR. SAWYER: For the purpose of taking the measurement he is using a pair of dividers that sets on the scale for the distance of a mile and a quarter; he then uses a course protractor with parallel lines setting one of the lines on the meridian on the chart.

I locate on Defendant's Exhibit E a point 1¼ miles north of Chambers Island light. (This point marked with a cross, marked with figure 1¼) I now draw a line from the blue cross marked W.P. on Defendant's Exhibit E

to the cross marked 1¼. Measuring from the blue cross marked W.P. 6½ miles takes you about ⅛ of a mile to the eastward of the point marked 1¼. This point is marked with cross and labeled "A."

MR. BIEBERSTEIN: For the information of the court the point 6½ miles from Williams Point is the east end of those nets of Mr. Christensen. The jury's answer was from Williams Point to 1¼ miles north of Chambers Island 6½ miles. That means from point 1¼ miles north of Chambers Island light 6¼ miles. It would be ⅛th of a mile to the eastward and the point is marked "A" and a small pencil cross.

CAPTAIN ANGWALL continuing:

If I had 20 nets measuring 30 fathom each that would be 3600 feet. Measure westerly 3600 feet on a line from point "A" is 1200 yards, approximately 7/10 of a mile. From the East end of the line marked "A" I measure westerly on that line marked W. P. on one end and "A" at the other end, 7/10 of a mile from point "A," Point "B" is approximately 3600 feet from point "A." Line AB crosses the dotted line marked SW ⅞ W 27 miles from Chambers Island to Boyer's Bluff, which line is the main steamboat channel. I now locate a point 1¼ miles southwesterly of point "A" and locate point "E." Point "E" is 1¼ miles southwest of the cross at "A." I now locate a point two miles southwest of point "A." The cross at point "F" is the point two miles southwest of point "A." I now draw a line from point "E" parallel to the line designated W.P. at the west end and "A" at the east end, and a line from point "F" parallel to the line W.P. and "A," to the west shore. Seventeen nets

of 35 fathom each is 595 fathom or 3570 feet. I now strike off 3570 feet westerly toward the west shore on line G to E from point "E." That point is marked "J." Calculating 24 nets of 30 fathom is 3270 feet. Beginning at the cross at point "F" I strike off the distance of 3270 feet, which is labeled point "K."

SPECIAL MASTER: I would like to ask a question. These crosses show the extreme western end of the nets.

MR. BIEBERSTEIN: Our calculation of the western end of the nets and also the east end. The east end was designated by the jury in its verdict and the western end is shown in these calculations.

SPECIAL MASTER: How near does that approach the line?

MR. BIEBERSTEIN: It shows that those nets were set across the steamboat channel.

SPECIAL MASTER: The point is that the evidence —that they crossed what the evidence tends to show was the main steamboat channel.

MR. BIEBERSTEIN: Of course, the record shows that upon the verdict of the jury the judge gave judgment to the plaintiffs.

JOHN E. TRACY produced as a witness on behalf of the defendant, testified as follows:

I am a Professor of law in the University of Michigan. I was in the private practice of law from 1904 down to the present. I was practicing law in Menominee, Michigan, from 1907 to 1913.

I have examined Plaintiff's Exhibits 31, 32, 33, be-

ing certified copies of records of the Circuit Court of Marinette County, Wisconsin, in certain cases against A. B. Bedell. I represented Mr. Bedell in those cases with Mr. Doyle of Menominee. Mr. Bedell was at the time a Michigan Conservation officer.

STATEMENT FOR PURPOSE OF THE RECORD

MR. SAWYER: In connection with the record, I wish to point out that the record of testimony in those cases has not been produced and that the balance of the record is incomplete, and that Mr. Tracy says there never was any decision in writing.

TESTIMONY OF MR. TRACY CONTINUED:

In the winter, sometime, I think in 1908-09, Mr. Bedell told us that he had seized some nets out in the bay, nets of Wisconsin fishermen. Realizing that there might be a dispute as to the exact location of the seizure, we instructed him to get a surveyor and have a survey made of the exact location of the nets, it being at that time in the middle of the winter and the Bay so frozen that you could easily walk on the ice. He did so and we had the surveyor plat on the chart the place where the nets were seized. I will locate, on Combined Exhibit 1, the place where the nets were seized. I will not say it is exact—it has been several years—but it was not far out from Williams Point. I would say the nets were seized about where I have marked.

I had charge of the preparation of the case for trial. Mr. Bedell was served over in Wisconsin and we appeared in his behalf to defend that suit, an action brought by the

fishermen for replevin of the nets. There were three suits.

After we saw on the chart where the nets were seized it became apparent to us that probably it was so far within the Michigan line there would be little question about the boundary. Nevertheless, I made some independent investigation; I made a trip to Sturgeon Bay and talked to some of the old sea captains there to find out what was meant by the definition in the Michigan Enabling Act as to the center of the most usual ship channel in Green Bay, and found that it ran somewhere west of Chambers Island, and, under any contention, very far east of where these nets were seized. When we came on for trial, or possibly before, I discovered by talking to opposing counsel we probably would not have any difficulty in the case over the question of boundary, because they told me where they would claim the nets were when seized, and they were fairly near Chambers Island at a point so far away from where we claimed they were seized that, for the purposes of litigation we were willing to concede that they would be in Wisconsin waters. I might say that for the purpose of the litigation we had no authority from the State of Michigan to make any stipulation of any kind. It was simply a civil suit in which we represented Mr. Bedell, and we had no correspondence with any state officials as to boundary line questions. We handled the case according to our best discretion; I think that possibly we stated our position before the judge that, so far as we were concerned, if the court should find that the nets were where they had marked on the chart, we were willing to concede it was Wisconsin waters. They made the same concession as to where we claimed they were. We were willing to make that concession because we felt so absolutely sure of our survey. I frequently cite this case to my stu-

dents as a perfect example of how you are never certain of winning any lawsuit because I expected a directed verdict on the facts of our survey. At the conclusion of the testimony by our surveyor that he had gone out there and fixed his course and distance and chained to the bank and made his calculation, the plaintiffs, the fishermen, put on witnesses who testified that they either stood on the bank or on the ice to watch our surveying party and that the surveying pary all moved as a group out on the ice and then came back again, and did no chaining, and that they all walked together. On our motion for a directed verdict the judge held that that constituted an issue of fact on which the testimony was controverted, and therefore let the case go to the jury. There was no written decision in that case. It all went to the jury on the judge's charge as to where, among all the conflicting testimony, the jury could find the nets were when they were seized. He submitted special questions to them, my mind has been refreshed on that since I have seen the copies of the record, and they made the finding that is in these exhibits, finding made in accordance with the contention of the plaintiffs as to the exact location of the nets.

I would think that the position where Captain Angwall located the nets on the chart would be about where the jury found them, although I would hardly think the nets were as long as from A to B. No issue was raised as to the length of the nets, nor any issue raised by us as to any question of just where the ship channel ran. Their location was so far outside of ours and we were so certain of being able to establish ourselves as correct that we may have been somewhat negligent in not computing more carefully just where the ship channel lay. Frankly, I don't know now as to whether the location of

the nets as found by the jury was east or west of the red line.

Q. It is fair to say that that exhibit would show, that the testimony of the fishermen would show that the east end of the three gangs of nets was east of the red line but that the nets were long enough so that they crossed the red line. That issue, you say, was not raised in that case?

A. No.

CROSS EXAMINATION BY MR. BIEBERSTEIN:

After the jury had located the nets the court must have decided that they were in Wisconsin waters in order to give judgment for the plaintiff. He gave judgment based on the specific findings of the jury.

The only conclusion we could reach was that the judge decided the nets were in Wisconsin waters at the time of the seizure.

SPECIAL MASTER: The inquiry was: "How far from the Michigan shore was the east end of plaintiff's nets which were taken by the defendants?" And the answer was: "From Williams Point to one and one-fourth miles north of Chambers Island light six and one-half miles." They fixed the location of only the east end of the nets?

MR. BIEBERSTEIN: Yes. But other testimony in the record shows the number of nets, the length of the nets and the number of nets in a gang, so that we get the total length of the gang of nets. All of that is in the record.

LAWRENCE MARTIN called as a witness on behalf of the plaintiff, testified as follows:

ON DIRECT EXAMINATION BY MR. BIEBERSTEIN:

My name is Lawrence Martin. I reside in Washington, District of Columbia. Exactly at the present, I am a geographer, resident in Washington, on leave of absence without pay from the Federal service. I have been and shall be Chief of Division of Maps in the Library of Congress. I held that position since 1924. Before that I was a geographer of the Department of State beginning in 1920, in charge of map collection of the Department of State and responsible for handling the geographical calls in the business of the Department of State. That might involve a question in any part of the world. My principal work in that connection was reading and studying maps and analyzing maps, advising the Department of State with reference to information so obtained. Prior to that I did some work for the War Department for three years, part with the army and part in Washington. The work with the Army was on both sides of the water. I was Chief of the Geographic Section of the Military Intelligence Division of the General Staff. Part of the time my work was similar to that in the State Department and part of the time I was detailed to the American Commission to Negotiate Peace, with work on boundary questions. Prior to that I was teaching geography and I was engaged in geographical investigations and the publication of books and articles relating to geographical problems. I was employed by the U. S. Geographical Survey and in 1907 did a considerable amount of work for the Lake Superior Region. I was employed by the Wisconsin Geographical Survey in subse-

quent years and did work that also took me in this region and that involved the study of the boundary somewhat. The latter was in the years between 1908 and 1917.

I wrote a text book on physical geography including Wisconsin and the Upper Peninsula of Michigan. I was teaching geography at the University of Wisconsin from 1906 to 1911, and studied the boundary problems of that state. I then wrote a certain section of my chapters. That was published in the year 1916 and then in the year 1932 I was asked to revise that book and it was re-published last year, with a much more full statement about the Michigan-Wisconsin boundary in the Menominee River and Green Bay in the light of the outcome of the previous suit.

I wrote a publication on the Michigan-Wisconsin boundary question which was a Presidential Address which I read before the Association of American Geographers at Columbus, Ohio, in December, 1929, which dealt with geographic phases of the Wisconsin boundary suit, 1923-1926.

I have studied tentatively Plaintiff's Exhibits 2 to 7 inclusive and Plaintiff's Exhibits 36 and 37, all of which plaintiff contends are extracts from the Michigan Red Book, otherwise known as Michigan Official Directory and Legislative Manual.

The dotted line in question is not shown upon these maps as starting from the Menominee River but by virtue of the position where the name of the city Menominee is printed, the dotted line begins a short distance off shore from Menominee; but the line is obviously meant to be the boundary between Wisconsin and Michigan. The dotted line on Exhibit 36 is obviously intended to represent the boundary between Wisconsin and Michigan. It differs from several among the Exhibits 2 to 7 in actually beginning at the mouth of the Menominee River.

Exhibits 2 to 7 differ in certain respects from each other and Exhibits 36 and 37 likewise differ from each other in details of drafting but are identical as to the position of the state boundary. The lines indicated as a boundary line on Exhibits 2 to 7 inclusive and 36 and 37 are not in accord with the red line on Combined Exhibit 1. They are strikingly similar to the blue line except that on these maps from the Michigan Red Book or Manual the boundary is a conventional boundary with a double complex curve while the blue line is an angular boundary controlled at certain points. The position of the dot dash line intended to be a boundary line between St. Martin's and Washington Island is half way between the islands named on Plaintiff's Exhibit 36.

Plaintiff's Exhibit 12 is published by an official department of the United States Government, I think by the United States Treasury, where the Surveyor General's office sat in 1885, when this map was published.

There is no thoroughly adequate statement about what an official map is, but it is generally said and rarely contradicted, that a map published by a state or a map published by a branch of said government, or a map published by the United States, is an official map.

There is an accord of significance between Plaintiff's Exhibit 12 and Exhibits 2 to 7 inclusive and also to Exhibits 36 and 37. The boundary between Wisconsin and Michigan on these maps agree in such essential respects as the fact that each of them is strikingly similar to the blue line on Combined Exhibit 1. None of them bear any resemblance to the red line on Combined Exhibit 1.

Plaintiff's Exhibit 17 was one of the maps showing the claimed lines in the Michigan-Wisconsin boundary suit,

1923-26. This was the map in one of the briefs of the State of Michigan, not the State of Wisconsin.

With respect to the dash dot line marked "Line claimed by Michigan" and the one clamed by Wisconsin, being West of Chambers Island, neither of them correspond to the present Michigan boundary claim. The line of dashes and dots on Exhibit 17 which is Michigan's inaccurate representation in 1923-4-5 of Wisconsin's claim is strikingly similar to the blue line on Combined Exhibit 1, in the present case.

SPECIAL MASTER: Is it claimed that this exhibit was anything more than a sketch map to indicate in general the claims of the two parties?

WITNESS: No, sir.

SPECIAL MASTER: It was not supposed or intended to be an accurate, definite map, but is a sort of sketch map, to give the court an idea of what is claimed?

WITNESS: It seems to me that precision is possible and is usually obtained even in making a sketch map to show what is claimed.

SPECIAL MASTER: My thought is simply this, that accurate map making is one thing, but a lawyer's rough sketch to indicate anything he is contending for in a lawsuit may be quite a different thing, and my thought is that you don't claim from your examination of this map that either party claimed that this was an accurate depiction of the line of boundary?

WITNESS: No, sir.

Q. At least, these lines on Exhibit 17 are precise enough so that you can tell us whether they generally correspond with the present boundary claims of Michigan and Wisconsin.

A. Yes, sir.

SPECIAL MASTER: It is fair to say that they are reasonably illustrative of the contention?

WITNESS: Yes, sir.

Wisconsin Exhibit 21 was taken from the map in Executive Documents Vol. 6, First Session of 29th Congress, is printed House Document No. 170, 29th Congress, First Session.

Plaintiff's Exhibit 21 A is a photostatic copy of said Document No. 170 being those letters of transmittal.

Plaintiff's Exhibit 21 A refers to a resolution of the House of Representatives which is contained in the 15th Vol. of the Congressional Globe for First Session of 29th Congress, 1845-46. There are no charted shipping courses upon Exhibit 21. I can only say that from my memory of the great number of maps of Green Bay which we handled eight or ten years ago in connuection with the original case, I cannot at the moment remember any map even as early as 1846 which showed shipping courses. There are a great many copies extant of maps which are also printed in government documents. I do not know that they did not print an additional supply for circulation. It might have been published for the use of sailors and fishermen; but we are purely in a field where I have not complete knowledge. Exhibit 21 has no indication of the Plum Island Light nor Grassy Island Light. There is none on Long Tail Point nor in the neighborhood of Eagle Harbor. There are words like "sunken rocks," and soundings, but I see no evidence of the existence of lights, buoys, or other aids to navigation.

The words in the lower left hand corner of this map reading "Triangulation, steamboat soundings, and location for soundings by Captain W. G. Williams, J. W. Gun-

nison, assistant; eastern shore and shore soundings by Lieutenant J. W. Gunnison, 1843," indicate to me that the map was intended for the purpose of aiding navigation. I think there is a very direct and important relation between this map and Cram's survey. That relationship may be approached through an examination of Plaintiff's Exhibit 38, which is Captain Cram's report of December, 1840. Remembering that Captain Cram was a United States Army Officer, especially delegated to delineate and demarcate the boundary between the State of Michigan and the State of Wisconsin, we read the conclusion of his report of December, 1840. They begin with references to Map No. 4 which is a part of Exhibit 38 and to the fact that the islands in the eastern part of Green Bay cause several ship channels. It is said that there were at least two ship channels in use by all classes and kinds of craft that navigated the Great Lakes, and that it would be next to impossible to ascertain the question as to which of these is the most usual ship channel of Green Bay. It is also stated that an equitable construction of the law establishing the boundary conveys the idea that Congress wanted the boundary to be in the best ship channel and that it would not be presumed—"and it is not to be presumed that two states bordering upon navigable ship channels, either state could or would in equity claim to appropriate the best of these channels exclusively to herself." Captain Cram goes on to say that it will be necessary to make a complete hydrographic survey of all the channels that exist in that portion of Green Bay east of the mouth of the Menominee River, in order to discover the best ship channel, if there be such.

MR. SAWYER: And if that construction be adopted?

WITNESS: Yes.

He says that the cost of necessary operations for establishing the boundary will not be less than $10,000 and the cost of the survey of the eastern end of Green Bay to discover the best ship channel, will not be less than $3,000.00. From other studies I know that the United States appropriated in all the sum of $17,000 between 1838 and 1847 and that the bulk of that sum was spent upon hydrographic work in Green Bay; and the fact that we can put together this appropriation from 1838 to 1847, a year after requests for this map by Congress, referring to Plaintiff's Exhibit 21, and its delivery, makes me think that this map may be considered to be a boundary which was also of use to sailors and fishermen and people engaged in commerce, rather than purely a map of the type that the United States Lake Survey has gone on making ever since. That makes me feel that there is a degree of impeccability and representation of the ship channels respectively east and west of Chambers Island upon this map.

My attention has been called to Plaintiff's Exhibit 50. It is a photostatic copy of the master copy in the General Land Office of the Department of Interior showing township 31 north, Range 27 west, Michigan Meridian, as surveyed in the third quarter of the year 1847, subdivided in second quarter of year 1848, and approved by Lucius Lyon, Surveyor General, on December 20, 1848.

I identify Sugar Island by the position of two small islands in the section and range where the central part of, the present part where Sugar Island is located. Exhibit 50 shows these islands to be surveyed but not divided into

lots. I can also identify Grassy Island by its position. There is no name there to assist, but there is no question of the location of Grassy Island, or of its having been divided into lots in 1848.

MR. SAWYER: What about the meander line there.

WITNESS: I say that is too technical for me. If a man sketches a line while meadering the adjacent government line, I should say it was included in the survey.

It does not appear from this exhibit that Sugar Island is a part of Lots 1 and 2, Section 11. Lot 6 of Section 2, Town 31 North, Range 27 West, of the Michigan Public Survey appears to include the eastern tip of Grassy Island and to lie westerly of Sugar Island. Grassy Island was surveyed into lots in 1848, Lot 1 of Section 3, Town 31 North, Range 27 West includes most of the eastern half of Grassy Island. The remainder of Grassy Island to the eastward being a tiny tip of land at this side in Lot 6 of Section 2. The remainder of Grassy Island is described as Lot 2 in Section 3.

Plaintiff's Exhibit 22 is United States Lake Survey map entitled "South end of Green Bay, the Islands at the Entrance thereof and part of the West Shore of Lake Michigan," published in 1864. There are charted shipping courses upon Exhibit 22 in Green Bay waters, one of them beginning not at the mouth of the Menominee River but at a point on the lake coast of Menominee, outside of Menominee. A shipping course extends northeastward to a point two and one-eighth miles west of Chambers Island, and at that point two shipping courses diverge, one going

northeast seven-eighths east to the vicinity of Boyer's Bluff. The direction is not given on the course from the point near the mouth of the Menominee River to the point two and one-eighth miles west of Chambers Island light.

Defendant's Exhibit E is United States Lake Survey Chart No. 2 of West shore of Lake Michigan including Green Bay, published in 1925, reprinted in June, 1933. The course from the mouth of the Menominee River upon Defendant's Exhibit E is entirely different from the course from the city of Menominee upon Plaintiff's Exhibit 22. Deendant's Exhibit E is the most remote from the Enabling Act of Michigan.

The two charts differ in that it begins and ends at different places. Both termini of the shipping course are different.

On Plaintiff's Exhibit 22 the line emanates from a point on the coast, the principal shipping point of the city of Menominee, on its lake front rather than its river front. I don't believe it came out of the mouth of the Menominee River but from some point north of that.

Plaintiff's Exhibit 22 has the other terminus of this segment of the shipping course farther west than Defendant's Exhibit E, referring to its position with relation to Chambers Island light.

I know of no map earlier than Plaintiff's Exhibit 22 that shows any charted shipping courses in Green Bay. The charted shipping course as it appears on Plaintiff's Exhibit 22, of 1864 has been changed since that time upon modern charts.

MR. SAWYER: If the Court please, I object to that. He just said he couldn't tell.

LAWRENCE MARTIN continuing:

That is another change, if I understand your question. It has been changed so that it begins at the mouth of the River. The other terminus has been changed by being moved nearer to Chambers Island at a point west of the light.

Plaintiff's Exhibit 23 is a map entitled "Survey of the Northern and Northwestern Lakes, West Coast of Green Bay, 1865." Opposite the mouth of the Menominee River, at its entrance into Green Bay, some lines are drawn, I should say in a different hand, I should say at a different date, and I should say perhaps in pencil rather than ink, and from these lines an arrow leads eastward through a maze of soundings, and terminates with a hand with a finger pointing to "Red lines are corrections made January 1880, from surveys in 1879." I have never seen the original of this map. The piers and light appear to me to be more likely to have been drawn in 1880. If we had the original map here we could be more certain.

MR. BIEBERSTEIN: I am willing to concede that the pier drawings were added in 1879 or '80, and were not established in 1865.

LAWRENCE MARTIN continuing:

Plaintiff's Exhibit 38 consists of Map No. 4, among the maps in Cram's Report of December, 1840, followed in —a photostat of Map 4, followed in typewriting by Cram's whole report, together with the letters of transmittal which took it to the Secretary of War, to the President, and to the Senate, which caused it to be read in order to be printed on February 3, 1841 as Senate Document 151, 26th Congress, Second Session.

Thomas Jefferson Cram was an army officer who spent two field seasons in marking the boundary between Wisconsin and Michigan and in working out the problems which the constitutions did not take full account of, so that the difficulties in the original description were mended and most matters were clarified before he was withdrawn to other duty. He was a man, in other words, eminently acquainted in every detail as to what was intended as a boundary and what were the difficulties in establishing it. It seems to me that Map 4 is the most official in connection with the present judicial proceedings and as official as any map connected with the present proceeding, and in some respects the most importat map that we have with respect to part of the boundary from the mouth of the Menominee River to the center of Lake Michigan. I identify the Island there called Pottawattamie as Rock Island; the island called Kayasha is Washington Island. The dotted line lying north of the island designated Pottawattamie Island is intended to represent one of the two alternatives in the mind of Captain Cram in 1840 as to where the boundary between Wisconsin and Michigan should be in the portion where the boundary is going from Green Bay into Lake Michigan. It is the northernmost of those two and the one in what we call the Rock Island passage rather than the one we call Porte des Mort or Death's Door, and there is a dotted line indicating a ship channel in Death's Door. The same applies to the dotted line lying between Chambers Island and the mouth of the Menominee River, and the dotted line east of Chambers Island marked "ship channel." Chambers Island is designated not by that name but by the name Mahnomah Island.

Q. Now, Colonel Martin, assuming that the Supreme Court of the United States has said that the principal ship channel passes through the Rock Island Passage, where does Cram's report place that ship channel north of Pottawattamie Island?

MR. SAWYER: Just a moment. Object to that as manifestly unreasonable. The map could not be meant to place the ship channel as defined by the Supreme Court eighty years later.

MR. BIEBERSTEIN: I don't think that objection is tenable. I think we have a right to make that assumption, the court having so decreed, having eliminated the other ship channels.

MR. SAWYER: I just make the objection so it will be in the record.

WITNESS: Could the question be read, please? (Question read.)

A. This map clearly suggests to me that Captain Cram thought that if the Rock Island passage turned out to be the main or principal ship channel from Green Bay to Lake Michigan, that the boundary ought to be halfway from Pottawattamie Island or Rock Island,, halfway northward.

MR. SAWYER: Halfway to the mainland, too?

WITNESS: No. I wouldn't say that.

MR. SAWYER: Pretty near halfway.

Q. Well, now, Colonel Martin, have you an opinion as to whether or not the words "ship channel" as used by Cram on Map Four referred to a shipping course?

A. Yes sir.

Q. And what is that opinion?

A. Why, it is perfectly clear in my mind that it does not refer to a shipping course in the sense of the present path of power vessels. It refers to a strait through which a boundary was to be drawn, a broad strait through which a boundary was to be drawn. That idea is supported by the text of Cram's report, in the section that was abstracted a little bit earlier today, as well as by the map.

MR. SAWYER: Just how did he indicate that the determination of the center was to be done only after he knew what channels to determine the center of? At the time he filed this report, this map, isn't that what he said?

MR. BIEBERSTEIN: We concede that Cram indicated two ship channels. We contend that the Supreme Court has decided which of the ship channels is the principal ship channel, and that our only duty here is to determine where that line will lie within that ship channel.

MR. SAWYER: On the other hand, we do not concede that either of the channels are anywhere near where Cram put them, or that there is any accuracy to this map other than a sketch map to depict the general condition.

MR. BIEBERSTEIN: We rely upon this map very much for the reason that it is within four years of the Enabling Act, and was made by an engineer sent out for the specific purpose of locating the ship channel.

Q. Now, Colonel Martin, do you have an opinion as to whether or not the words "ship channel" between Chambers Island and the mainland were intended by Cram to indicate a shipping course?

A. I do.

Q. What is your opinion?

A. That they were not intended to indicate a shipping course.

Q. In your opinion, what were they intended to indicate?

A. They were intended to indicate the position of one of the two ship channels which Cram considered likely to turn out to be the principal ship channel in the portion west of Chambers Island.

Q. Now, Colonel Martin, assuming that the United States Supreme Court has decreed that the principal ship channel of Green Bay, that the most usual ship channel of Green Bay, is somewhere between Chambers Island and the west shore, have you an opinion as to whether or not Cram's location of that ship channel corresponds with the modern shipping course upon the charts such as Defendant's Exhibit E?

MR. SAWYER: What is that question?
(Question read.)

MR. SAWYER: I don't see any relation between the assumption and the question.

A. I must confess that I do not see the necessity of calling the first clause an assumption; I know it to be a fact that the Supreme Court has made such a determination. The answer to the end of that question is that—my answer to the last part of the question is that it does not correspond to the modern shipping course on Defendant's Exhibit E.

Q. Now, Colonel Martin, calling your attention again to Map Four, and to the extent to which the dotted lines marked "ship channel" are marked there, does that portion of it which passes through the Rock Island Passage, is that in accord with either the Michigan or the Wisconsin contention as to the correct boundary of 1933?

A. The line marked "ship channel" on Map Four of Plaintiff's Exhibit 38 in the portion north of Rock Island and Washington Island corresponds with great fidelity to the blue line upon Combined Exhibit 1, being Wisconsin's proposal with respect to the boundary in 1933.

Q. Does it bear any resemblance to the red line on Combined Exhibit 1 in the Rock Island passage?

A. Not the least.

Q. Now, calling your attention to the designation of "ship channel" between Chambers Island and the mouth of the Menominee River on Map Number Four of Exhibit 38, is that in accord with either Michigan's or Wisconsin's contention in 1933 as to where the true boundary lies?

A. It is not in accord with Michigan's contention. It is much like Wisconsin's contention, the point being that the dotted line marked "ship channel" west of Mahnomah, or Chambers Island, is drawn out a distance between a quarter and a third of the distance from the island to the mainland on Cram's map of 1840, and is drawn half-way from the island to the mainland on Combined Exhibit 1, the portion where a blue line indicates the 1933 proposal of Wisconsin with respect to the state boundary.

Q. Does the line indicated "ship channel" on Map Four of Plaintiff's Exhibit 38 bear any resemblance to the red line on Combined Exhibit 1 at that point?

A. Not the least.

With respect to a vessel negotiating along the red line or the blue line within two miles out of the Menominee River, it would have equal difficulty following either of these proposed boundaries, because it would be wrecked within a mile or two of the Menominee River.

Q. Will you tell us whether or not a vessel would have greater difficulty or less difficulty in traveling over the thirteen-foot depth or the twelve and three quarters foot depth?

A. It depends on the draft of the vessel.

I have an opinion as to whether or not it is important for the boundary line to follow a course which can be navigated by vessels. My opinion is that it is extremely undesirable that a boundary line should coincide with the precise course of vessels. My opinion is that the boundary line as proposed by Wisconsin is entirely reasonable and entirely in accord with other boundaries that are in similar waters and with international boundaries that are in similar waters.

MR. SAWYER: Object to the question and ask to have the answer stricken out on the ground that it is not responsive and not based on any evidence in the case; is merely a personal conclusion of the witness as to the desirability of the location of the boundary.

LAWRENCE MARTIN continuing:

I consider the boundary proposal by the State of Wisconsin in this action an excellent boundary.

MR. SAWYER: Same objection.

LAWRENCE MARTIN continuing:

My opinion is that the boundary proposed by the State of Wisconsin is a better boundary than one that follows the course modern power vessels, the charted course of modern power vessels.

MR. SAWYER: Same objection.

I have an opinion as to what is meant by the words "ship channel" as used in the Michigan Enabling Act of 1836.

Q. And what is your opinion?

MR. SAWYER: I object to that on the ground that he has not been qualified to have an opinion, until shown on what he bases it.

A. A ship channel is a kind of a passage in a lake or an arm of the sea, for which the word "Channel," "straits," "roads," and such words are used.

Q. Do you have an opinion as to whether or not it has any application to the matter of a charted shipping course?

A. Yes, sir.

Q. What is your opinion?

A. That there is no relation, except, of course, charted shipping courses go through ship channels.

Q. Are there any exhibits in this case, Colonel Martin, which support your construction of the, of what is meant by the words "ship channel" in the Michigan Enabling Act?

A. I should like to turn the exhibits in this case over, one by one, before answering that.

Q. You shall.

(Witness examines exhibits.)

A. Plaintiff's Exhibit 38, being Captain Cram's 1840 map, has the words "ship channel" four times, and statements in the text, particularly on page 17, indicate Captain Cram's construction of the words "ship channel" are in accord with my own views.

Q. Are there any other exhibits, calling your attention particularly to Exhibits 118, 132, 146, 130?

A. I could, as I have proposed, turn over charts and point out ship channels on a number of modern maps, but I do not think it is necessary. Plaintiff's Exhibit 118 is a typewritten extract from the "Great Lakes Pilot" of 1921, the volume entitled "Green Bay, Northern Shore of Lake Michigan, and Adjacent Islands, to the Straits of Mackinac," and that is a publication of the Hydrographic Office of the United States Navy. That is the United States Navy's Coast Pilot.

MR. SAWYER: In the bulletin?

WITNESS: No; it is the lake survey.

Q. Will you point out what parts of that exhibit support your construction of the words "ship channel?"

A. Plaintiff's Exhibit 118, consisting of five typewritten pages, includes a statement on page four, being the next to the last paragraph, in which it is clear that Rock Island Passage is designated, as a specific instance, and the Rock Island Passage is one illustration of a ship channel. The only thing necessary is to be perfectly definite is that this particular ship channel, from the description of the Federal Government in 1921, appears to extend from St. Martin's Island on the north to Rock Island and Washington Island on the south.

Q. Will you look at Exhibit 130 for me and state what that is?

A. Plaintiff's Exhibit 130 is an extract from the manuscript volume of the Journal of Douglas Houghton, from the Library of the University of Michigan, and this extract which makes up this

exhibit comes from page 494 and refers to Douglas Houghton's—and includes Douglas Houghton's field notes in this journal in the year 1839. He uses in this, on the second page of the typewritten excerpt, the third from the last paragraph, the following words. In the previous paragraph he has described Louse Island, which is Rock Island. He then says: "Between this island and St. Martin's Island is the principal ship channel to Green Bay." That, of course, is the statement of a man who was, at the time of writing it, a Michigan State Geologist, who had also been designated as Michigan Boundary Commissioner.

Q. Calling your attention to Exhibit 132, will you state what that is?

A. Plaintiff's Exhibit 132 is an excerpt from "Thompson's Coast Pilot," published at Detroit in 1865 and this is the portion—this excerpt is the portion that described Green Bay and provides aids to navigators in Green Bay. At a number of pages the straits between the islands, the things that we popularly call "straits" in the geographical and popular nomenclature, are designated "channels." I observe, for instance, St. Martin's Channel is north of St. Martin's Island; Poverty Island Channel—and those are ship channels and are designated in such language as to indicate that they extend from one shore of the island or mainland to the shore of an adjacent island or mainland in each case.

Q. Now, calling your attention to Exhibit 146, will you state what it is?

A. Exhibit 146 is an excerpt from Bulletin 33, of the U. S. Lake Survey, dated April 1924. It likewise contains statements of the same kind which occur in the earlier publication of this type, and on page three of this exhibit is a description of the

Rock Island Passage, which likewise indicates that the Federal Government—in this case, the War Department Division of the Federal Government's survey of the north and northwestern lakes, regards the Rock Island Passage, which I call a ship channel, as a passage which extends from St. Martin's Island on the north to Rock Island and Washington Island on the south.

MR. SAWYER: Are there sailing directions in connection with this?

WITNESS: Not in the excerpt; there are in the bulletin.

MR. SAWYER: You have merely the description here. You haven't got your Coast Pilot in at all?

MR. BIEBERSTEIN: No. I will put it in.

Q. Exhibit 135 I want to call your attention to, too, Colonel Martin?

A. Plaintiff's Exhibit 135 is an extract from "James Barnet's Coast Pilot for the Lakes," sixth issue, published at Chicago in 1872. The exhibit consists of quotations from pages 8, 9, 23 of this publication, and describes Pottawattamie Light, Green Island Light, and gives sailing directions from Point—it is written "Point,"—Waugoshance to Poverty Island and past Louse, or Rock Island; and the particular things in this exhibit that appear to apply to the issues in the present case are these; on page eight it is said that north of Pottawattamie Light a ten foot shoal in the channel, I should say the ship channel appears, giving the direction. On page nine, the description of Green Island Light includes the words "The best channel (six miles wide) is to eastward of this island." A channel, then, may have

such width as six miles. Finally, on page twenty-three, the sailing directions indicate that in running from Point Waugoshance to Boyer's Bluff, that is through the Rock Island Passage which is not here mentioned in terms, a ship runs through this channel. Therefore, usage in 1872 was that a channel was a thing of substantial width, extending from bank to bank, and not such a thing as the modern course of a powered vessel, as in the case of the printed lines which underlie the red line in large part on Combined Exhibit 1.

Q. I further call your attention, Colonel Martin, to Exhibit 102, an extract from the "Green Bay Intelligencer," of December 25, 1833, and will ask you whether that lends support to your construction of the word "channel"?

A. Plaintiff's Exhibit 102 indicates that only three years before the Wisconsin Enabling Act, before the, I should say the Michigan Enabling Act—only three years before the Michigan Enabling Act, popular usage, as is indicated in the newspaper, was that a channel was of the type that I have indicated. I quote from the second page of Exhibit 102, where we find the words: "The channel is wide and strongly marked until near the mouth of the Fox River, where it becomes somewhat crooked," and so forth.

Q. Colonel Martin, in your opinion are there any—is there more than one ship channel in Green Bay?

A. Yes, sir.

Q. Will you point out on Combined Exhibit 1 the ship channels in Green Bay near Chambers Island? I beg your pardon. Will you point out on Combined Exhibit 1 all of the ship channels you see there?

SPECIAL MASTER: Well, do more than point out. Designate them, so it will get in the record.

A. Beginning at the northeast corner of Combined Exhibit 1 a passage between Poverty Island and Little Gull Island is designated by the words "Poverty I. Passage." That, in my opinion, is a ship channel. A strait between Little Gull Island and St. Martin's Island is designated by the words "St. Martin's I. Passage," and that I would likewise regard as a ship channel. Between St. Martin's Island Shoal and Rock Island are printed the words "Rock I. Passage," and "I" standing for "Island" in each case. That is also a ship channel; and south of Washington Island, the strait designated as "Detroit Passage" and the strait designated as "Porte des Morts Passage" are likewise ship channels. Of these ship channels so far named, the one here designated as "Rock Island Passage" is the northern and easternmost shown on Captain Cram's map of 1840, and the one designated as "Porte des Morts Passage" is the southern and easternmost one shown on that map, Plaintiff's Exhibit 38. There are two—

Q. Now, Colonel Martin—

A. Oh—

Q. Continue. I asked you to point out the ship channels.

A. In the vicinity of Chambers Island there is, on the extreme east, near Door County, Wisconsin, a strip of water between a group of islands and shoals, of which the Strawberry Islands are the largest, a channel called on Combined Exhibit 1, "Strawberry Channel." That is a ship channel. West of the Strawberry Islands and east of Chambers Island is a channel without name, which appears to me to be the easternmost of two south-

ern ship channels on Cram's map of 1840. West of Chambers Island and east of Ingallston and other places in Menominee County, Michigan, is a broad strait, here without name, which is clearly the southern and westernmost of the ship channels on Captain Cram's map of 1840.

SPECIAL MASTER: May I ask at that point, do I understand the one east of Chambers Island, designated on Cram's map, is or is not in fact a ship channel?

WITNESS: I think the one east of Chambers Island on Cram's map is a ship channel.

Q. Colonel Martin, will you point out for us, if you can, the limits of the ship channel which you say lies to the north of Rock Island?

A. The one of these ship channels north of Rock Island, the first north of Rock Island, has its limits, according to these Coast Pilots from the 1860's to the present time, as well as according to my own view, Rock Island to the north coast of Washington Island as its south bounds, and St. Martin's Island and Little Gull Island as its north bounds, and includes all of the water from Rock Island to St. Martin's Island, and so forth, although Combined Exhibit 1 prints the words "Rock I. Passage" only in the southern half of that strait, or ship channel.

MR. SAWYER: Southern half? Or southern quarter, or eighth.

WITNESS: Southern half.

Q. Now, Colonel Martin, will you designate for us what, in your opinion, is the center of the ship channel you have just described?

A. It is in the immediate vicinity of St. Martin's Island Shoal and the Nine Foot Shoal, which are designated by those words on Combined Exhibit 1, and the blue line on Combined Exhibit 1 runs through the center of this ship channel.

Q. Will you point out for us, Colonel Martin, the limits—Strike that. Calling your attention to Death's Door Bluff, and Cedar River on the Michigan shore almost opposite, oriented with the direction of the waters of Green Bay, is there one or more than one ship channel between those points?

A. I should say that there were two ship channels between those points, one extending north, from the northeast towards the southwest, east of the Whalesback Shoal, and the other extending from the northeast towards the southwest, west of the Whaleback Shoal.

Q. Do you know whether the Whalesback Shoal is an Island or not? Does it protrude above the water or not?

A. The Whaleback Shoal, I think, is a reef, not an island. I have not visited it, but have studied it attentively on charts.

Q. Colonel Martin, calling your attention to the ship channel which you say lies west of Chambers Island, between there and the Michigan shore—

A. Might I add a sentence to that statement?

Q. Certainly.

A. As this is a shoal and not an island, it would be equally possible to say that at this point the whole stretch of water constituted one ship channel, which forks to the north of Chambers Island.

Q. You mean the whole stretch of water between Death's Door Bluff and Cedar River?

A. Yes, sir.

SPECIAL MASTER: Would that be equally true between Boyer's Bluff and the mainland, the Michigan mainland?

WITNESS: Yes, sir.

SPECIAL MASTER: All of that territory there you would call one ship channel, to the northwest? I mean to Boyer's Bluff?

WITNESS: Well, it seems to me that one could do it either way. Personally—There are other ship channels north of Poverty Island Passage that are named on this map. So many ship channels come through the islands of the Grand Traverse. Now, one might say that each of those went somewhere in connection with those courses of powered vessels. There may be sailing directions that carry vessels through, as in this case. Here is a course through the Poverty Island Passage which goes West Northwest one half west fourteen and one half miles to a fog signal, and on the port side as you proceed west are Minneapolis Shoal, North Driscall Shoal, and so on, and to the right are other shoals. One construction would be that this is a ship channel, and another would be that everywhere there may be reefs, and that usage does not demand using the words "ship channel." In other words, in my definition of "ship channel," which is my attempt to adapt Cram's report and the Enabling Act to modern conditions, I think the simplest thing to do is to take the fast land, I mean not the reefs but the land above all sages of water, mainland or island, to limit the ship channel.

MR. SAWYER: I think at this time I should interpose the objection to all this, and ask to have it stricken out unless it refers to the language of the Enabling Act,

"most usual ship channel," and refers to the date 1836, when that Act was entered. So we have had no reference whatever in this dissertation to the most usual ship channel.

MR. BIEBERSTEIN: No, but certainly reference has been had to the meaning of the language in 1836, in my first question.

MR. SAWYER: Well, I think a proper discussion would show that it applied to ships passing in those days, the routes and distances to and from which they passed, and the area that was covered in those days as compared to how much of the area is shown on the exhibit about which he is testifying.

MR. BIEBERSTEIN: Well, we can't do everything at once.

SPECIAL MASTER: Will there be more on this subject?

MR. BIEBERSTEIN: Yes.

Q. Coming back to Combined Exhibit 1, you testified that in your opinion there was a ship channel lying between Chambers Island and the west shore of Menominee County, Michigan, did you not?

A. Yes, sir.

Q. Will you describe the limits of that channel?

A. I should say that it begins at the southwest corner of Chambers Island and extends northeasterly, Chambers Island being somewhat triangular, to the north corner of Chambers Island near sounding four as the east bank of that ship channel, and that its west bank was the coast of Menominee County, Michigan, from approximately Arthur Bay to Ingallston, on Combined Exhibit 1.

Q. And in your opinion, Colonel, does the red line on Combined Exhibit 1, or the blue line—Strike that. Is there any line on Combined Exhibit 1 which, in your opinion, conforms to the description "in the middle of that channel?"

A. The blue line is in the middle of that channel.

Q. Is that also synonymous with the word "center?"

A. Yes, sir.

Q. In your opinion, is the red line the center of that channel?

A. No, sir.

Q. Colonel Martin, coming back to Combined Exhibit 1, are there any shipping courses on Green Bay other than the one followed by the red line?

A. Yes, sir.

Q. Have you an opinion as to whether or not any of the other shipping courses would make a boundary line equally as good as the red line?

A. I have such an opinion.

Q. What is it?

MR. SAWYER: Objected to as incompetent, irrelevant, and immaterial; not having anything to do with the issues in this case; purely speculative and dealing only with the witness's desires and opinions; not based on the evidence.

A. If one must have a state boundary which follows a shipping course, the one which begins two miles west of Chambers Island Light and extends northward to Little Bay de Noc, designated by the letters "SSW ¾ W 37¼ miles," east of Cedar River, would, in its southern portion, have been a better boundary line than the one proposed by Michigan and here represented by the red line on Combined Exhibit 1.

Q. Why?

A. Because it would have more nearly approximated

an equal division of waters, and would not have tended to deprive fishermen of their rights.

COLONEL LAWRENCE MARTIN (continuing):
ON CROSS EXAMINATION BY MR. SAWYER:

I am an experienced navigator in a limited way. I have sailed a sailboat three hundred miles down the reefy coast of Alaska, a thirty, thirty-five foot, powered gas boat, through wilderness waters in Alaska. I have sailed on ships on the ocean; launches and sailboats on the Great Lakes; and followed courses, picked up buoys, and so on on the charts, and, in a certain limited way, I have a knowledge of the meaning of the words that have to do with navigation.

Some of these waters were charted and some uncharted; some lighted and some unlighted. Boats that I controlled myself were usually boats of from two to four feet draft. On one occasion I had a large steamship turned over to me, the captain staying on the bridge but insisting that I should issue all the directions to the man at the wheel, because it was in uncharted waters, or, rather, because the only chart available was not a government chart but a map chart of the soundings, which I had taken myself in that place in previous seasons. That was a vessel that probably drew twenty to twenty-five feet of water.

Q. What was the result of that experience?
A. Why, I ran it on a reef and it cost twenty thousand dollars to repair the holes in the bottom; and I am, therefore, conscious of the danger in sailing over rocks.

In this work of navigating it has been necessary to lay out courses in foggy weather; rarely, however. I am

acquainted with the fact, to a large extent, that successful navigation under all weather conditions is tied up to the possibility and ability of the navigator to lay a compass course and to follow it more or less exactly. I would say all references to shipping and courses of shipping, and the channels which shipping follows, are, therefore, to a certain extent related to courses which are laid out by the vessels in traversing those waters.

Special counsel in the former case of Michigan vs. Wisconsin consulted me a great deal. I was a witness in the case and testified at great length and produced a substantial number of maps. The maps from which I have testified in this case, being Exhibits 1, 2-7 inclusive, 12, 17, 28, 34, 35, 36, 37, 42, 43 and 45 were all in evidence in the other case. A large proportion of them certainly are maps which do not show depths of water, aids to navigation, and such features of hydrographic maps. I would say that that was true of all of them.

Q. Is it your idea that in placing that boundary curved line on this map the geographers were attempting to follow the middle of the ship channel?

A. I think that is a natural assumption.

Q. Is it your idea that they made any effort to determine what was the most usual ship channel?

A. I think so.

Q. And that they did that in the light of the passage, or the date of that Ac[illegible]

A. You are asking me a question that involves a period when I was not as familiar with the making of these maps as I am at present.

Q. You have expressed an opinion, Colonel Martin, that these men were trying to make an accurate depiction of this boundary as defined in that Act,

and I am asking if you really believe that those men went to those lengths in placing those lines on those maps?

A. Yes; I think so.

The red line on Combined Exhibit 1 from a point approximately midway between Menominee and Egg Harbor or approximately the center of the open water channel in that area in Green Bay conforms to my idea of where the middle of the channel should be. The northern half of it is objectionable. The southern terminus is halfway between Horseshoe Bay and the mouth of the Menominee River, which meets my ideas.

I am familiar with the decision in the former case, which determines that the shipping course, which was the most usual shipping course and therefore the boundary here, passes west of Chambers Island and on down Green Bay. The line just referred to projects into Green Bay from the mouth of the Menominee River, comes to or very close to the course of that shipping channel. Construing the language of the Enabling Act, "down the middle of the main channel of the Menominee River and to the middle of the most usual ship channel of Green Bay," this would not quite conform to the calls and my idea of the middle of the channel, about three-eighths of a mile off, and the line extending east by south gives Michigan waters which she did not contend for in this suit. Michigan drew lines around her islands. I cannot see how the court could refuse to do anything except to assume that she wanted the waters up to those islands. I do not know that there was anywhere in the briefs the statement that those lines were drawn accurately. The context was to the effect that the islands lying on one side or the other of those lines belonged to one state or the other.

Referring to Exhibits 1-7, inclusive, I testified that the curved lines on these maps were more nearly similar to the blue line on Combined Exhibit 1 and was entirely dissimilar from the red line. But drawing attention to the southerly terminus of the curved line it is not the same as the blue line on Combined Exhibit 1. The western terminus of the curved line on Plaintiff's Exhibits 2, 3, 4, 5, 6, and 7 is not on the mouth of the Menominee River but in Green Bay north and east of the mouth of the Menominee River, approximately in the same latitude. That would indicate to me that the geographer expected the line to pass out of the river to that terminus. The blue line does not go towards the portion of the ship channel south of Chambers Island. The direction of the mouth of the Menominee River is not the same as it was in 1836. There would be a variation of 30° to 40°.

Referring to the maps 3, 4, 5, 6, and 7, I have a speculative opinion as to the origin of that line. It is a speculative opinion of what I can read from the maps.

Referring to Exhibit 10, the curved line is inaccurate in its western terminus. The wrong river has been identified as the Menominee. We have another exhibit on which the wrong rive ris shown and is labeled with the name "Menominee." Also the Escanaba River is shown entering into Big Bay de Noc instead of Little Bay de Noc. It is possible the map maker located the correct river in the wrong river is shown and is labeled with the name accurate information as was extant in 1838, when the map was made. We have learned a great deal since about the shapes and orientations. The river depicted as the Menominee is between forty and forty-five miles too far north. The shape of the entire north end of Green Bay is wrong. The corresponding size of Mullen's Island and Keane's

Island differs greatly from the corresponding size of Washington Island and Rock Island.

Referring to Exhibits 36 and 37, the western terminus of the curved line commences at the mouth of the Menominee River. In departing it initially turns a trifle east, a trifle north of east in destinction from south of east, and then distinctly northeastward. It is a fact that it begins almost due east and curves to the north. On neither of these maps do I find any distance represented between Chambers Island and the mouth of the Menominee.

Referring to Exhibit 36 there are omissions as to islands between the two peninsulas. I think the islands in Wisconsin are accurate up to the scale of the map and that the islands in Michigan are inaccurate.

Referring to Exhibit 18, a sketch of the mouth of the Menominee River is found in the Douglas Houghton Journal. I read the arrow on that map to indicate that north is at the bottom of the map. The flow of Menominee River into Green Bay as shown on that map is approximately correct in the light of that reading. The general flow is first southerly, then northeasterly, then generally easterly, turning down to the southeast before it comes to the mouth. I know of my own knowledge that the general trend of the river below the rapids is southeasterly.

From a point midway between the piers at the mouth of the Menominee harbor to the steamship track identified on Combined Exhibit 1 by the letters S by W ⅛ West, 12 miles, is a distance about 7⅛ miles. The portion of the decree which reads "thence along said ship channel North by East one-eighth East eight and seven-eighths miles," corresponds with this steamship track on Combined Exhibit 1. The courses and distances are the same. That line passes along the shipping course, passing west of

Chambers Island to the sailing objective, two miles west of Chambers Island Light. That is a point which would commonly be known to mariners.

The third course, North by East ⅞ East 27 miles is not the same as the course identified on Combined Exhibit 1, which is Northeast ⅞ East 27 miles. The difference is the inclusion of the word "by" in the course. If the word 'by" were eliminated the course and distance given in the decree would correspond with the third section of the red line on Combined Exhibit 1. That course and distance starting at the sailing objective two miles west of Chambers Island Light would continue along the shipping course passing west of Chambers Island and reaching the sailing objective at the entrance to Rock Island Passage going east.

The last course in the decree "thence continuing along said ship channel East one fourth North ten and one fourth miles," corresponds to that section of the red line on Combined Exhibit 1 passing through Rock Island Passage.

Assuming that the decree read "from a point midway between the outer ends of the Menominee River piers, thence East by South 7⅛ miles to the center of the most usual ship channel of Green Bay, thence along said ship channel North by East ⅛ East 8⅞ miles, thence continuing along said ship channel Northeast ⅞ East 27 miles, thence continuing along said ship channel East one-fourth North 10¼ miles, thence East three-fourths North to the boundary between the state of Wisconsin and the State of Michigan in the middle of Lake Michigan, "the red line on Combined Exhibit 1 would conform to that language.

The words "most usual ship channel" do not necessarily import the passage of ships along the line referred to. There is no evidence of intention on the part of the

Supreme Court to adopt the courses given on the Government charts as the center of the most usual ship channel in defining the boundary in the decree. It is a fact that changing the length of the first course from 7½ miles to 7⅛ miles and eliminating the word "by" the boundary would exactly follow the shipping courses through the passages determined to be the most usual ship channel.

The line on Combined Exhibit 1 from a point midway from the outer ends of the Menominee River piers to the shipping course given on the charts goes the shortest possible distance, but I do not construe that as a true line because it is a different angle than the course coming out of the harbor. I take it the course coming out of the harbor is occasioned by the direction in which dredging was done when the harbor was improved. The sailing directions for Rock Island passage in Barnet's Coast Pilot read as follows: "In running through this channel keep Boyer's Bluff, which is seven miles from Rock Island Lighthouse, just open from Rock Island to clear the shoal off southeast from the end of St. Martin's Island." Those sailing directions would take a ship through the passage just off Rock Island and Boyer's Bluff.

Q. Colonel, you testified yesterday that the aids to navigation, such as spars, can buoys, and so on, were always available as physical points in a boundary. Are you sure of that point, or is it the custom in this area to remove those buoys about the close of navigation in the fall and put them back at the opening of navigation in the spring?

A. I assumed that they were there all winter.

Q. You knew the condition of this territory, that during three, four, or five months of the year that water is frozen solidly?

A. Yes. I didn't know how solid, how far from shore.
Q. And that frequently, with shifting winds, the ice will move?
A. Yes, sir.
Q. With the result that it will carry these buoys away with it?
A. Yes, sir.
Q. Are you willing now to take my word that they are only there during the period of navigation?
A. Yes, sir.

I do not know whether Boyer's Bluff is visible from Bark River under ordinary conditions. It is a fact that shipping courses shown on modern charts are lanes of travel that are commonly known to all fishermen and navigators.

Referring to the curved line on Plaintiff's Exhibit 34, I believe that dotted line was meant for the boundary. The line is close to Chambers Island. Much closer than the blue line on Combined Exhibit 1. It is also true of Exhibit 35.

From my examination of the maps in evidence in this case, I would say that what we call the old maps generally depict by dotted lines what is called ship channels, and the modern maps generally depict by dotted lines what we know as shipping courses.

ON REDIRECT EXAMINATION BY
MR. BIEBERSTEIN:

From 1865 to 1839, the date when Douglas Houghton made the sketch map which is Plaintiff's Exhibit 18, was a period of twenty-one years. Without attempting to do

the simple arithmetic from which one would derive results, it might be said then that a careful calculation would show that in 1839 there was a magnetic variation at the mouth of the Menominee River of, well, say ten degrees and we will say toward the eastward.

Q. Do you know, Colonel, whether there were any sailing directions in 1836, published by any official agency or private agency, to enable navigators to navigate the Rock Island Passage or the channel west of Chambers Island and east of the Michigan shore.

A. After extensive reading over a period of more than twenty-five years, I have never heard of any such directions that applied to the ship channel west of Chambers Island. With respect to the ship channel in what we now call the Rock Island passage, I cannot recall at the moment whether there was more than one map in the Wisconsin-Michigan boundary case in 1923-26 that bore upon that matter, but there is one map in this record that came from that, and that is Farmer's map of 1830, which shows a line marked "ship chan." That map gives no courses, so that the line may be followed by naviators.

Q. I ask you whether the course east by south out of the point midway between the outer ends of the Menominee River piers, whether that course strikes the shipping course south by west one-eighth west at right angles?

A. It does not.

Q. So that that is not the shortest distance between the center of the outer ends of the Menominee River piers and the shipping course south by west one-eighth west?

A. The red line drawn on this exhibit is not the shortest, not the most direct line.

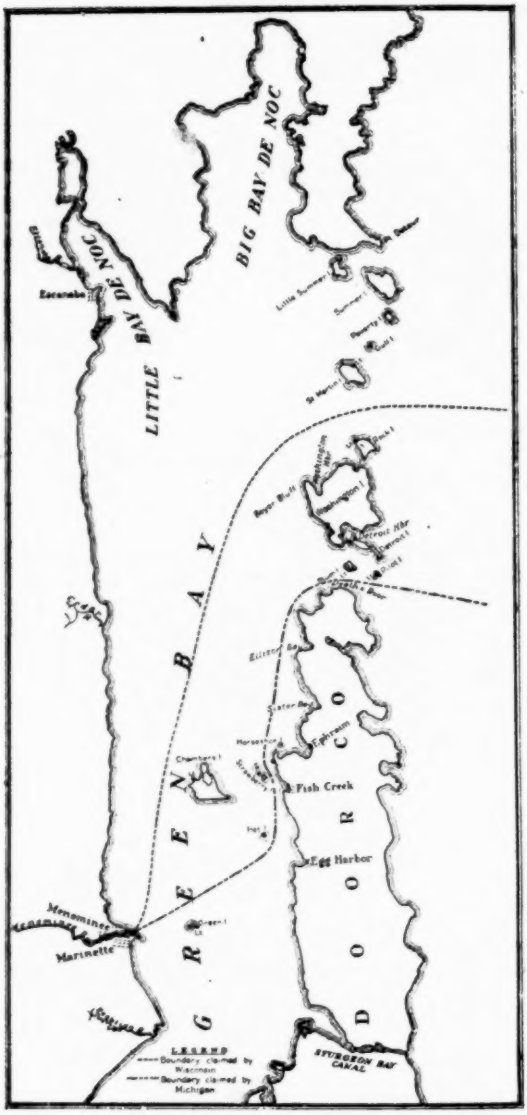
Plaintiff's Exhibit 3

(This map appeared in the Michigan Offical Directory and Legislative Manual, published by the State of Michigan, under the direction of its Secretary of State, alternate years from 1917 to 1931 inclusive)

Plaintiff's Exhibit 36

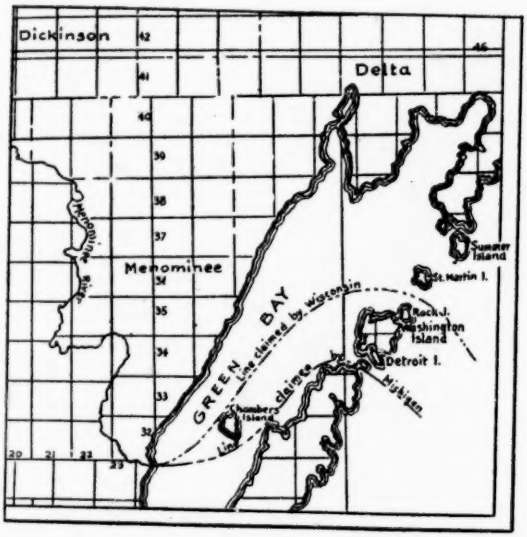
(This map appeared in the Michigan Offical Directory and Legislative Manual, published by the State of Michigan, under the direction of its Secretary of State, alternate years from 1917 to 1931 inclusive)

Plaintiff's Exhibit 1



(Wisconsin's representation of the boundary proposals of the parties in former litigation—1923-26. It appears opposite page 20 of Defendant's Brief in that case)

Plaintiff's Exhibit 17



(Michigan's representation of the boundary proposals of the parties in former litigation—1923-26. It appears opposite page 2 of Plaintiff's brief in that case)

At defendant's request there is here reproduced a sketch and legend thereon appearing at page 24 of Michigan's Reply brief in former litigation 1923-26.

Plaintiff's Exhibit 38

This is Map No. 4 of Captain Cram's Report.

CRAM'S FIRST REPORT

December, 1840.

26th Congress, (SENATE) (151)
2nd Session.

MESSAGE

from

THE PRESIDENT OF THE UNITED STATES,

in compliance

With a resolution of the Senate in relation to the survey to ascertain and designate the boundary-line between the State of Michigan and the Territory of Wiskonsin.

February 3, 1841.

Read, and ordered to be printed; and that 500 additional copies be furnished for the use of the Senate.

To the Senate of the United States:

I respectfully transmit, herewith, a report and accompanying documents, from the Secretary of War, in answer to a resolution of the 22d of December, 1840, requesting the President "to transmit to the Senate any information in his possession relative to the survey directed by the act of the 12th of June, 1838, entitled 'An act to ascertain and designate the boundary-line between the State of Michigan and the Territory of Wiskonsin!"

M. VAN BUREN

Washington, February 1, 1841.

War Department, February 1, 1841.

Sir: The accompanying report of the Colonel of Topographical Engineers, detailing the measures taken for ascertaining and marking the boundary-line between the State of Michigan and the Territory of Wiskonsin, and the progress which has been made therein, is respectfully submitted in reply to the resolution of the Senate of the 22d December last, calling for information on that subject, which was referred by you to this department.

Very respectfully, your most obedient servant,

J. R. POINSETT.

To the President of the United States.

Bureau of Topographical Engineers,
Washington, January 30, 1841.

Sir: A resolution of the Senate, dated the 22d of December, 1840, referred to this office for a report, calls upon the President "to transmit to the Senate any information in his possession relative to the survey directed by the act of the 12th June, 1838, entitled 'An act to ascertain and designate the boundary-line between the State of Michigan and the Territory of Wiskonsin.' "

There is a second act of Congress on this subject, dated the 20th July, 1840, which places the superintendence of the survey of this boundary under the War Department. Although this second act is not referred to in the resolution of the Senate, yet, as the information collected under it is highly essential to a correct understanding of the matter, it will be submitted as a part of this report.

The letter herewith enclosed, and marked No. 1, from the Commissioner of the Land Office, gives a history of the proceedings under the act of June, 1838; and the reports from Captain Cram, Nos. 2 and 3, give detailed accounts of those under the act of July, 1840.

From these documents it will be seen that the boundary cannot well be surveyed without additional legislative action, as well in reference to the description of the boundary, as to funds.

Captain Cram estimates a sum of $13,000, in addition to the previous appropriation of $3,000, for the completion

of this survey; which is respectfully recommended to your consideration.

I have the honor to be, sir, your obedient servant,

J. J. ABERT,
Col. Corps Topographical Engineers.

Hon. J. R. Poinsett,
Secretary of War.

No. 1.

General Land Office,
January 4, 1841.

Sir: In answer to the resolution of the Senate, passed on the 22d ultimo, referred by you to this office on the 29th ultimo for a report, and herewith returned, in the following words:

"Resolved, That the President of the United States be requested to transmit to the Senate any information in his possession relative to the survey directed by the act

of the 12th June, 1838, entitled 'An act to ascertain and designate the boundary-line between the State of Michigan and Territory of Wiskonsin,'" I have the honor to state—

That, in pursuance of your letter of the 27th of February last, communicating the order of the President that this office should take charge of the business of surveying and marking the line in question, under the act of the 12th of June, 1838, and directing that it should be entered upon without delay, the preparation of the necessary instructions was immediately commenced at this office; at the same time, for the purpose of carrying into effect the suggestions of the honorable Messrs. Norvell and Crary, of Michigan, made in their joint communication to the President, of the 24th of February last, that the survey might be made by some officer of the corps of topographical engineers, a correspondence was opened, with your approbation, with the Secretary of War, which, in the beginning of April last, resulted in the appointment of Lieutenant Colonel Kearney, of this service. A short time after which, in consultation at this office, he gave it as his opinion, that the appropriation of $3,000 made by the act to defray the expense of the survey, was entirely inadequate for the purpose; and, under the proviso contained in the law, "that the whole expense of surveying, marking, and designating the said boundary-line should not exceed that sum," and especially as it had been represented that the line to be run was an impracticable one, the action of this office was necessarily deferred until further legisla-

tion by Congress. Subsequently, by the second section of the act entitled "An act making appropriations for the support of the army for the year one thousand eight hundred and forty," approved July 20, 1840, (see pamphlet Laws, 26th Congress 1st session, page 51), the above mentioned sum of three thousand dollars was reappropriated, "to be expended, under the direction of the Secretary of War, for the accomplishment of the same object;" since which, this office has had no further control of the business.

Copies of the correspondence of this office, relative to commencing the survey under the original act, and the appointment of Colonel Kearney, have not been made out to accompany this report, not being deemed material; but, if required, will immediately be made and transmitted.

All which is respectfully submitted.

I am, sir, your obedient servant,

JAMES WHITCOMB,
Commissioner.

Hon. Levi Woodbury,
Secretary of the Treasury.

No. 2.

REPORT ON THE SURVEY OF THE BOUNDARY BETWEEN THE STATE OF MICHIGAN AND THE TERRITORY OF WISKONSIN.

DESCRIPTION OF THE BOUNDARY.

"To the mouth of Montreal river (of Lake Superior) thence through the middle of the channel of the said river Montreal, to the middle of the lake of the Desert; thence in a direct line to the nearest head of the Menominee river; thence through the middle of that fork of said river just touched by the said line, down the centre of the main channel of the same, to the centre of the most usual ship channel of the Green bay of Lake Michigan; thence through the centre of the most usual ship-channel of Green-bay, to the middle of Lake Michigan; thence," etc.

Such is the language of the description contained in the letter of instructions of date July 30, 1840, from the Topographical Bureau, and which is presumed to have been quoted from the act of Congress concerning this boundary.

In the same letter of instructions, explicit directions were communicated with reference to the place of commencing the survey. In obedience to these directions, the survey was commenced on that part of the boundary which may be called imaginary, or that which is not characterized or marked by natural or physical features, viz.: the portion between the head-waters of the Montreal and Menomonee rivers.

On a careful reading of the foregoing description of the boundary, it will be inferred—

1st. That Lake of the Desert was supposed, in the act of Congress, to be a head-water of, and to discharge itself into, Montreal river; for the words in the description are, "thence through the middle of the channel of the said river Montreal, to the middle of the Lake of the Desert."

2d. That somewhere between Lake Superior and Green bay, there was a known lake bearing the name "Lake of the Desert," for the language describing the boundary specified that the "middle of the Lake of the Desert" shall be a point in the boundary.

3d. That of all the head-waters discharging themselves into the Menomonee river, one would be found nearer to the said Lake of the Desert than any other; for the description says, "thence in a direct line to the nearest head of the Menomonee river."

4th. That the nearest head of the Menomonee to the said lake would be found to be a branch of the Menomonee, and not a lake; for the description reads, "thence through the middle of that fork (branch) of the said river just touched by the said line, down the centre of the main channel of the same," etc.

The four suppositions here enumerated were doubtless made by the committee of Congress who drafted the description of the boundary, and predicated on information derived from a map similar to one entitled "map of the entire Territories of Wiskonsin and Iowa, published by order of the Legislative Assembly of Wiskonsin, by L. L. Judson," and which was supposed to present a more accurate delineation of the waters between Lake Superior and Green bay than any other map extant.

An exact copy of as much of said map as is necessary for illustration is attached to this report, and marked No. 1.

Upon this map it will be perceived that the boundary between Michigan and Wiskonsin is laid down as following a direction from Lake Superior nearly southeast to Green bay; and that the courses of the Montreal and Menomonee rivers, taken together, constitute a general route in the same direction; and that Lac Vieux Desert (Lake of the Desert) is not only represented on this map as being the head of the Montreal, but is likewise represented as the head of the Menomonee.

Now, although the map from which No. 1 has been copied bears the high sanction of a legislative assembly it is proven by the survey that that portion of this map upon which the boundary is laid down is exceedingly erroneous; and therefore, if it be true that this map, or one similar to it, was taken as a guide in draughting the description of the boundary, it is not surprising that the said description, so far as it relates to the head-waters of the Montreal and Menomonee, is so worded that the conditions of the act defining the boundary cannot be complied with to the full extent of all the requirements contained in said act.

The survey was prosecuted as far as the inclemency and rigor of the advanced stage of the season would permit; but if there had been ever so much time left, and ever so genial a temperature for field operations, the survey could not have been carried any further, on account of having reached a point, beyond which the description of the boundary ceased to be in accordance with the physical character of the country.

It was ascertained that Lac Vieux Desert, or "Lake of the Desert," has no connection whatever with the Montreal river; and that the nearest distance between said lake and this river is such, that an Indian requires eight days, without a pack, to pass from one to the other: and it

is also believed, with much confidence, that the Montreal river does not head in a lake, but takes its rise in an extensive swamp. Neither is Lax Vieux Desert, or "Lake of the Desert," at all connected with the Menomonee river; but this lake was found, contrary to the opinions of all except the Indians, to be the principal head of the Wiskonsin river.

The Montreal river was found to have a course different from what was supposed; so have the courses of the Menomonee, and of its principal branches, been equally mistaken and misrepresented.

Map No. 2, which is attached to this report, exhibits a more faithful delineation of the country between Lake Superior and Green bay, along the route of the boundary, than any other map; for it has been made up from actual reconnoissances, explorations, and minute surveys of the route which it represents. Still this map should only be regarded as an approximation to the truth that part of it, however, which represents the district between Lac Brule and Lac Vieux Desert, and which it was necessary to survey, is accurate; being from minute surveys. The same degree of accuracy is to be attributed to the portion between the mouth of the Menomonee and the White rapids, and to that portion immediately north of Green bay, and to the portion representing Green bay itself. The other parts of the map are made from reconnoissances and explorations of the ground, and from information derived from Indians whose representations are entitled to confidence.

And it may here be well to remark, for the benefit of those who may hereafter be sent upon a similar duty into this wild region, that information derived from French voyageurs, (or, more properly, French fur packers,) who

traverse the country to collect furs for traders, cannot be relied on, as a general rule, with so much confidence as that which may be elicited from the Indians. The chief aim of the voyageur, while collecting his pack of furs, is to pass from one point to another in the least possible time; so intent is he upon accomplishing this, that he performs his trip with no more observation upon surrounding nature than is evinced by a stage-horse in passing from one relay to another. Not so, however, with the native born Indian hunter: he knows every stream, swamp, lake, hill, or dale, that comes within the circuit of his beat, with a surprising minuteness: and there are those among the band who will impart information to one who will take the trouble and proper course to win their confidence. Much valuable information, pertaining to the route of the boundary was obtained from Indians.

I am under obligations to Ramsay Crooks, Esq., president of the American Fur Company, for information derived from him, as well as from a small sketch of a portion of the Chippewa country with which he favored me in the fall of 1839. The information obtained from this gentleman has been of service, and is embodied (with slight corrections consequent upon a personal examination of the ground) in map No. 2.

Map No. 3, which is affixed to this report, represents, on a large scale that portion of the country which was minutely surveyed between Lac Brule and Lac Vieux Desert: it also represents a part of Brule river—that fork or branch or head of the Menomonee which is found to be situated nearest the lake, called in the act of Congress "Lake of the Desert," which, however, is more generally known by the name Lac Vieux Desert. From this map it will be seen that the portion of the act of Congress, or of

the description of the boundary, which reads "middle of the Lake of the Desert; thence in a direct line to the nearest head of the Menomonee river," can now be complied with, and the "direct line" run on the ground or laid down on the map, provided the starting-point, "the middle of the Lake of the Desert," shall be first fixed. But it may be asked, what is "the middle of the Lake of the Desert?" From the contour of this lake, which is exhibited on map No. 3, it will at once be perceived that the term "middle," as applied to it, is very indefinite; and that it would require much labor to determine its middle, and to establish a monument so as to mark a corner or point in the boundary. The labor, of course, would not be objected to; but if required to be performed, means adequate to the end should be provided.

Again: from the course which the Montreal river is now found to have, and from the fact that Lake of the Desert has no connexion whatever with this river, it will also be perceived that it would be impossible to run a line according to the meaning of the words in the description of the boundary, "thence through the middle of the channel of said river Montreal, to the middle of the Lake of the Desert." It is true, that the channel of the river might be followed to its very head, and from this head a line could be run over the ground to the middle of the Lake of the Desert; but it is not presumable that such a random line was ever intended by Congress to constitute any portion of the boundary in question. It was undoubtedly supposed that the Lake of the Desert was the head of the Montreal; and that a natural boundary would be found to be provided all the way from the mouth of the Montreal to the middle of the lake; and that it would only be necessary

to mark out a line from the middle of this lake to the nearest head-water of the Menomonee river.

From this interpretation, it will be evident that the instructions from the Bureau of Topographical Engineers have been fully complied with; and that the survey of the boundary has been prosecuted as far as was practicable under those instructions for this season, notwithstanding the difficulties which were encountered.

From the foregoing discussion of the route, it will now appear that it would be exceedingly difficult, yea, utterly impossible, to run the boundary-line in complete accordance with the present reading of the description in the act of Congress; particularly on that part of the ground between the Montreal river and the head of the Menomonee (the Brule river) which comes nearest to "Lake of the Desert." And from all the circumstances of the case it is evident that another action of Congress will be required in relation to this boundary, to the matter of defining it in such a manner that it can be established on the ground, or laid down on a map, with that degree of definiteness which should always characterize a boundary-line between two states.

Here the subject might be dropped by me; but as the survey has developed information which may be of use in the event of any future legislation, it is deemed proper and, in any event, I trust it will not be regarded officious in me, to present the following suggestions as part of this report:

There is no doubt of Lac Vieux Desert (as written on the map, and generally so called) being the identical lake with that which seems to have been intended in the description of the boundary, and therein called "Lake of the

Desert," and whose middle is made one point of the boundary.

The three islands of this lake have, from their relative positions, been named South Island, Middle Island and North Island.

Lac Vieux Desert, now being known, might be brought into the boundary by specifying some point within the periphery of the lake for one physical point of the boundary. All indefiniteness, much labor, and expense, would be avoided by simply saying, in the law, that the highest point of ground (whether of earth or rock) upon Middle island shall be the point, instead of saying "middle" of the lake.

The present description makes the "middle of the channel" of the Montreal river a part of the boundary. The term "middle of the channel" is indefinite, because islands may occur, which would of course cause more than one channel. By specifying which channel in such cases shall be followed by the boundary-line, another ambiguity would be avoided. It is also evident, that it should be specified how far up the Montreal the boundary shall extend, before leaving for Lac Vieux Desert. For example: the law might specify that the boundary, in ascending, shall follow the extreme right-hand channel, from the mouth of the river, up to where it shall be found to be intersected by a straight line drawn from the highest point of Middle island, to some specified branch of Montreal river. Such a description would be divested of vagueness, and would allow of this portion of the boundary being established at comparatively less cost.

As the shortest line from said point on Middle island to the nearest water flowing into the Menomonee would

probably terminate in a swamp, (see map No. 3,) it would be well to say that this part of the boundary shall be a direct line from the highest point of Middle island to the middle of the channel of the outlet of Lac Brule; thence through the middle of the Brule river &c.

The "centre of the main channel" of the Menomonee is made a part of the boundary. This river contains numerous islands, and consequently more than one channel where these islands occur. It will be impossible in many of these cases to know which is the "main channel," without minute surveys. In many cases it was tried, and found impossible to decide by a simple inspection or reconnoissance which was the "main channel." It should also be remarked here, that the term "main channel," applied to the multiplicity of channels of the Menomonee, would be somewhat ambiguous in any event; for, it may be asked, is the main channel the widest channel of the river, or is it the deepest? If it be the widest or deepest now, will it be the widest or deepest hereafter? or shall the main channel be that through which the greatest quantity of water shall be found to pass at the time of the survey? And if it should occur that two channels at the same island pass equal quantities of water, which would then be regarded as the boundary? these questions are sufficient to show the indefiniteness of the term "main channel." There are also a few islands in the Brule river, to which similar questions might apply, in reference to the term "main channel."

To avoid all ambiguity in reference to these channels, it might be specified in the act defining the boundary, that, in descending the stream, the boundary shall follow the extreme left-hand channel of the Brule, and the extreme

right hand channel of the Menomonee, down to a well known point of the river—say Pe-me-ne falls; and thence to follow the extreme left-hand channel of the remainder of the Menomonee to its mouth. Such a division would leave some of the islands in Michigan, and the remainder in Wiskonsin, and would avoid much expense in minute surveys to ascertain the "main channel," and would leave no indefiniteness upon this particular part of the boundary. The free use of either channel for the purposes of navigation would from an established principle of law, be open at all times to the citizens of either State, and the islands would be nearly distributed in equal proportions between the two States.

After descending the channel of the Menomonee "to the centre of the most usual ship-channel of the Green bay of lake Michigan," the boundary is made to run "thence through the centre of the most usual ship-channel of Green bay, to the middle of Lake Michigan."

From map No. 4, which accompanies this report, it may be inferred that the islands which are in the eastern part of Green bay would cause several ship channels. It is a well known fact to all who have any personal knowledge of the navigation of this bay, that there are at least two ship-channels, which are in use by all classes and kinds of craft that navigate the great lakes. It would be next to an impossibility to collect the testimony that would be required to decide the question, which of these is the "most usual ship-channel of Green bay?" And it is not easy to conceive any other mode (than by testimony) by which the "most usual ship-channel" could be ascertained. But suppose this method of collecting testimony practical: it might occur that all of the evidence that could be obtained

on the subject would prove that one of these channels is just as much in use as the other; in which case, it would only be shown that there is no such thing as the "most usual ship-channel" in this part of the bay.

Although the term "most usual ship-channel" is used in the description of the boundary, still it is rather to be presumed that this term was intended to imply in the act of Congress the best ship-channel of all that may be found in that portion of Green bay referred to. An equitable construction of the law would convey this idea; for, it is not to be presumed that, of two States bordering upon navigable ship-channels, either State would or could, in equity, claim to appropriate the best of these channels exclusively to herself.

If the interpretation of the term "most usual ship-channel," implying the best ship-channel, be correct, it will be necessary to make a complete hydrographic survey of all the channels that exist in that portion of Green bay east of the mouth of the Menomonee river, in order to discover the best ship-channel (if there be such) among all the ship-channels now in use in that part of the bay.

After this survey shall have been made, the particular channel along which the boundary shall run may be declared.

It is important to the interests of Michigan and Wisconsin that this part of the boundary be immediately ascertained on account of the question of jurisdiction over the islands in the eastern part of the bay.

With the modifications now respectfully suggested, the description of the boundary would be to the following effect, to wit:

"To the mouth of Montreal river (of Lake Superior;) thence (in ascending) through the centre of the extreme

right-hand channel that the said Montreal river may be found to have, as far up the same as where the said channel shall be found to be intersected by a direct line drawn from the highest point of ground on Middle island of Lac Vieux Desert, north* — degrees west; thence (from the said intersection) along the just described direct line, to the said point of Middle island; thence (from the said point of Middle island) in a direct line to the centre of the channel of the outlet of the Brule; thence following the centre of the extreme left hand channel of Brule river (Wesacota sepe) down to the middle of the channel of the Menomonee river; thence following the centre of the extreme right-hand channel of the Menomonee river; down the same to the head of Pe-me-ne falls; thence following the centre of the extreme left-hand channel of the Menomonee river, down to the centre of the best ship-channel of the Green bay of Lake Michigan; thence following the centre of the best ship channel of Green bay, to the middle of Lake Michigan."

Such a description as this, if authorized by Congress, would allow of the boundary being established without any material difficulty; and it would cause no material departure from what is conceived to have been the intention of the law as it is now worded. The proposed description would moreover leave the State of Michigan and the Territory of Wiskonsin with nearly the same relative quantities of territory as they would have respectively possessed had the Montreal, and the Menomonee, and Lac Vieux Desert, been situated as was supposed in framing the present law of the boundary. Besides, the field operations, which will be necessary to establish the boundary, would be attended with much less expense, on account of having

*The number of degrees left to be fixed by the proper authority.

to make no minute surveys of the islands (and consequent channels) in the Montreal, Brule, and Menomonee rivers.

Owing, however, to the absence of all facilities in a wilderness like that of the route of this boundary between the mouth of the Montreal and Lac Vieux Desert, thence to the outlet of Lac Brule, the cost of the necessary operations for establishing the boundary, will not be less than $10,000; and the cost of the survey of the eastern part of Green bay, to discover the best ship-channel, will be not less than $3,000. These sums being exclusive of what has already been appropriated.

I have the honor to be, sir, very respectfully,

your obedient servant,

TH. JEFFERSON CRAM,

Captain Top. Eng.

December, 1840.

To J. J. Abert,

Col. Topographical Engineers, Washington.

SUBSEQUENT ATTEMPTED LEGISLATION

It is stipulated and agreed that the following proceedings are shown by Congressional Records, following the filing of Cram's Report:

S. 9, 27th Congress, 3rd Session

This bill was introduced by Mr. Porter, the United States Senator from Michigan, in the 27th Congress, 3rd

Session, was entitled "an act to establish the Northern boundary of the State of Ohio and to provide for the admission of Michigan into the Union," and was known as S. 9. This bill was read twice and referred to the Judiciary Committee on December 14, 1842.[1] This bill provided for a Wisconsin-Michigan boundary in Green Bay which was to proceed from the mouth of the Menominee River,

> "to the main ship chan[n]el of Green Bay which passes on the western side of the islands situate therein; thence along said main ship channel of Green Bay to the middle of Lake Michigan as further described in said act." (i.e., the act of June 15, 1836).

This bill was reported without amendment from the Committee on the Judiciary.[2] In this report Senator Clayton of said committee quotes extensively from Captain Cram's report[3] with reference to ship channels in Green Bay, and then says,

> "the bill referred to the committee disposes of these difficulties by making the western channel the boundary, which throws the islands in that Bay to Wisconsin."[4]

The Chairman of the Senate Committee on the Judiciary, participated in the enactment of the Michigan Enabling Act of June 15, 1836. The above bill was engrossed

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[1]Congressional Globe, Vol. 12, 1843, page 50.
Journal of the Senate, 27th Congress, 3rd Session, p. 29.
[2]Journal of the Senate, 27th Congress, 3rd Session, p. 110.
[3]Wisconsin Exhibit 38.
[4]Senate Document 80, 27th Congress, 3rd Session, p. 3.

and read a third time on February 27, 1843 and passed the Senate on February 28, 1843.[5]

In the House the bill was referred to the Committee on Territories on February 28, 1843, and on March 3 it was ordered to be committed without amendment to the Committee of the Whole House on the State of the Union. Congress adjourned on March 3, which prevented the passage of the bill.

S. 6, 28th Congress, 1st Session.

In the next Congress (28th Congress, 1st Session), Mr. Porter, United States Senator from Michigan, on December 15, 1843, introduced a bill to amend an act entitled "An act to establish the northern boundary line of the State of Ohio and to provide for the admission of the State of Michigan into the Union, upon the condition therein expressed." The bill was read twice and referred to the Committee on the Judiciary.[6]

The bill was designated as S. 6 and provided for a boundary which was to proceed from the mouth of the Menominee River,

> "to the main ship channel of Green Bay, which passes on the western side of the islands situate therein; thence along said main ship channel of Green Bay to the middle of Lake Michigan, as further described in said act." (i.e., the act of June 15, 1836)

On January 30, 1844, this bill was reported without amendment accompanied by a special report No. 70.[7]

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[5]Journal of the Senate, 27th Congress, 3rd Session, p. 231.
[6]Dec. 15, 1843, Congressional Globe, Vol. 13, 1844, p. 37.
[7]Journal of the Senate, 28th Congress, 1st Session, p. 94.

This report repeats the statements of the Judiciary Committee of the previous Congress concerning the "western channel." This bill, as did the previous one, attempted to amend the Michigan Enabling Act, and, as already stated in the previous Congress, the necessity for amendment according to Senator Clayton's report appeared to be due to the fact that there were several ship channels in Green Bay as indicated by Captain Cram's report.

The bill was engrossed and read a third time on February 27, 1843,[8] and passed the Senate on March 28, 1844.[9]

The bill went to the House on March 28, 1844,[10], was read a first and second time and referred to the House Committee on the Judiciary on April 4, 1844.[11] The bill was reported without amendment and committed to the Committee of the Whole on the State of the Union on April 17, 1844.[12]

House Bill, No. 470, 28th Congress, 2nd Session.

In the next session of Congress in the Journal of the House of Representatives for December 23, 1844, the following record appears:

> "In pursuance of previous notice, Mr. James B. Hunt (of Michigan) asked, obtained leave and introduced a bill (No. 470) to amend an act entitled 'an act to establish the northern boundary-line of the State of Ohio and to provide for the admission of the State of Michigan into the Union, upon the conditions therein expressed,' approved June 15, 1836: Which bill was

[8]Journal of the Senate, 28th Congress, 1st Session, p. 195.
[9]Journal of the Senate, 28th Congress, 1st Session, p. 199.
[10]Journal of the House of Rep. 28th Congress, 1st Session, p. 697.
[11]Journal of the House of Rep. 28th Congress, 1st Session, p. 737.
[12]Journal of the House of Rep. 28th Congress, 1st Session, p. 804.

read a first and second time and referred to the Committee on the Judiciary."[12]

Plaintiff's Exhibits 31, 32 and 33

Plaintiff's Exhibit 31 is a certified copy of the record in the case of Eli Christianson v. A. B. Bedell, et al., in the Circuit Court of Marinette County, Wisconsin.

Plaintiff's Exhibit 32 is a certified copy of the record in the case of James Peterson v. A. B. Bedell, et al., in the Circuit Court of Marinette County, Wisconsin.

Plaintiff's Exhibit 33 is a certified copy of the record in the case of Charles Nylund v. A. B. Bedell, et al., in the Circuit Court of Marinette County, Wisconsin.

The records stated are complete except as to the testimony which could not be transcribed by reason of the intervening death of the reporter.

In lieu of reproducing the pleadings and process, it is agreed that the same show: Each of said actions was an action in replevin for the recovery of fish nets, brought by the alleged owners of the nets, residents of Wisconsin, against A. B. Bedell, a Michigan Conservation officer, resident at Menominee, Michigan, alleging unlawful seizure by said defendant. The pleadings were filed on April 25, 1908. The answer was a general denial. Personal service of process was obtained upon said defendant in Marinette County, Wisconsin. John E. Tracy was one of the attorneys of record for said defendant in each action. The following record consists of the verdict of the jury and the judgment in each of said cases.

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[12]Journal of the House of Rep. 28th Congress, 2nd Session, p. 134.

Plaintiff's Exhibit 31

STATE OF WISCONSIN

CIRCUIT COURT FOR MARINETTE COUNTY

Eli Christensen, VERDICT

Plaintiff,

FILED

vs. May 13, 1909
C. A. Budlong
Clerk of the Circuit
Court for Marinette Co. Wis.

A. B. Bedell and Frank Riser
Defendants

1st Question: What was the value of the plaintiff's nets when taken by the defendants on March 12th, 1908?

Answer: Decided to allow $7.00 per net, making on 20 nets, $140.00.

2nd Question: How far from the Michigan shore was the East end of the plaintiff's nets which were taken by the defendants?

Answer: From Williams Point to 1¼ miles north of Chambers Island Light, 6½ miles. Measurements taken from Exhibit No. 1.

Foreman:
F. E. McWayne

STATE OF WISCONSIN

CIRCUIT COURT FOR MARINETTE COUNTY

Eli Christensen, Plaintiff,

vs.

A. B. Bedell and Frank Riser, Defendants.

JUDGMENT
FILED
Feb. 10, 1910
C. A. Budlong,
Clerk of the Circuit
Court for Marinette
Co. Wis.

The motion for judgment coming on for hearing in the above entitled action at a regular term of said court held at the Court House in the City of Marinette, Marinette County, Wisconsin, on the 31st day of January, 1910, Messrs. Feeney & Miller and W. B. Quinlan, appearing for the plaintiff, and John E. Tracy and M. J. Boyle appearing for the defendants, and after hearing the arguments of counsel, and being advised in the premises, and the court having ordered judgment in favor of the plaintiff and against the defendants,

Now, on Motion of Messrs. Feeney & Miller, and W. B. Quinlan, plaintiff's attorneys,

IT IS ADJUDGED: That the plaintiff, Eli Christensen, do have and recover of and from A. B. Bedell and Frank Riser, the defendants, the possession of the property described in the complaint, as follows: Twenty (20) fish nets, together with the sum of six cents as damages as assessed as aforesaid, for such detention, and in case a delivery cannot be had of said property, then that said

plaintiff have and recover of and from the said defendants the sum of one hundred and forty dollars ($140), the value of his said property, in addition to his said damages, together with the sum of Forty Five Dollars and Fifty Seven Cents, the costs of this action.

Dated this 8th day of February, 1910.

By the Court:

C. A. Budlong
Clerk.

Plaintiff's Exhibit 32

STATE OF WISCONSIN

CIRCUIT COURT FOR MARINETTE COUNTY

James Petersen,
Plaintiff,
vs.
A. B. Bedell and Frank Riser,
Defendants.

VERDICT
FILED
May, 13, 1909

C. A. Budlong
Clerk of the Circuit
Court for Marinette
Co. Wis.

1st Question: What was the value of the plaintiff's nets when taken by the defendants on March 12th, 1908?

Answer: Decided to allow $10.00 per net, making on 17 nets, $170.00.

2nd Question: How far from the Michigan shore was the East end of the plaintiff's nets which were taken by the defendants?

Answer: From Williams Point to East end, being 1¼ miles S.W. of Christensen, 6¼ miles. Measurements taken from Exhibit No. 1.

Foreman:
F. E. McWayne

STATE OF WISCONSIN

CIRCUIT COURT FOR MARINETTE COUNTY

James Petersen, Plaintiff,

vs.

A. B. Bedell and Frank Riser, Defendants.

JUDGMENT
FILED
Feb. 10, 1910

C. A. Budlong
Clerk of the Circuit
Court for Marinette
Co. Wis.

The motion for judgment coming on for hearing in the above entitled action at a regular term of said court held at the Court House in the City of Marinette, Marinette County, Wisconsin, on the 31st day of January, 1910, Messrs, Feeney & Miller and W. B. Quinlan, appearing for the plaintiff, and John E. Tracy and M. J. Doyle appearing for the defendants, and after hearing the arguments of counsel, and being advised in the premises, and the court having ordered judgment in favor of the plaintiff and against the defendants,

Now, on Motion of Messrs, Feeney & Miller, and W. B. Quinlan, plaintiff's attorneys,

IT IS ADJUDGED: That the plaintiff, James Petersen, do have and recover of and from A. B. Bedell and Frank Riser, the defendants, the possession of the property described in the complaint, as follows: Seventeen fish nets, together with the sum of six cents as damages as assessed as aforesaid, for such detention, and in case a de-

livery cannot be had of said property, then that said plaintiff have and recover of and from the said defendants the sum of one hundred and seventy dollars ($170), the value of his said property in addition to his said damages, together with the sum of Forty Five Dollars and Fifty Seven Cents, the costs of this action.

Dated this 8th day of February, 1910.

By the Court:

C. A. Budlong
Clerk.

Plaintiff's Exhibit 33

STATE OF WISCONSIN

CIRCUIT COURT FOR MARINETTE COUNTY

Charles Nylund,

Plaintiff,

vs.

A. B. Bedell and Frank Riser,

Defendants.

VERDICT
FILED
May 13, 1909

C. A. Budlong
Clerk of the Circuit
Court for Marinette
Co. Wis.

1st Question: What was the value of the plaintiff's nets when taken by the defendants on March 12th, 1908?

Answer: Decided to allow $6.00 per net, making on 50 nets, $300.00.

2nd Question: How far from the Michigan shore was the East end of the plaintiff's nets which were taken by the defendants?

Answer: From William's Point to East End, being 2 miles S.W. of Christensen, 6⅛ miles. Measurements taken from Exhibit No. 1.

Foreman:
F. E. McWayne.

STATE OF WISCONSIN

CIRCUIT COURT FOR MARINETTE COUNTY

Frank Seidel, (substituted for Charles Nylund)
Plaintiff,

vs.

A. B. Bedell and Frank Riser,
Defendants.

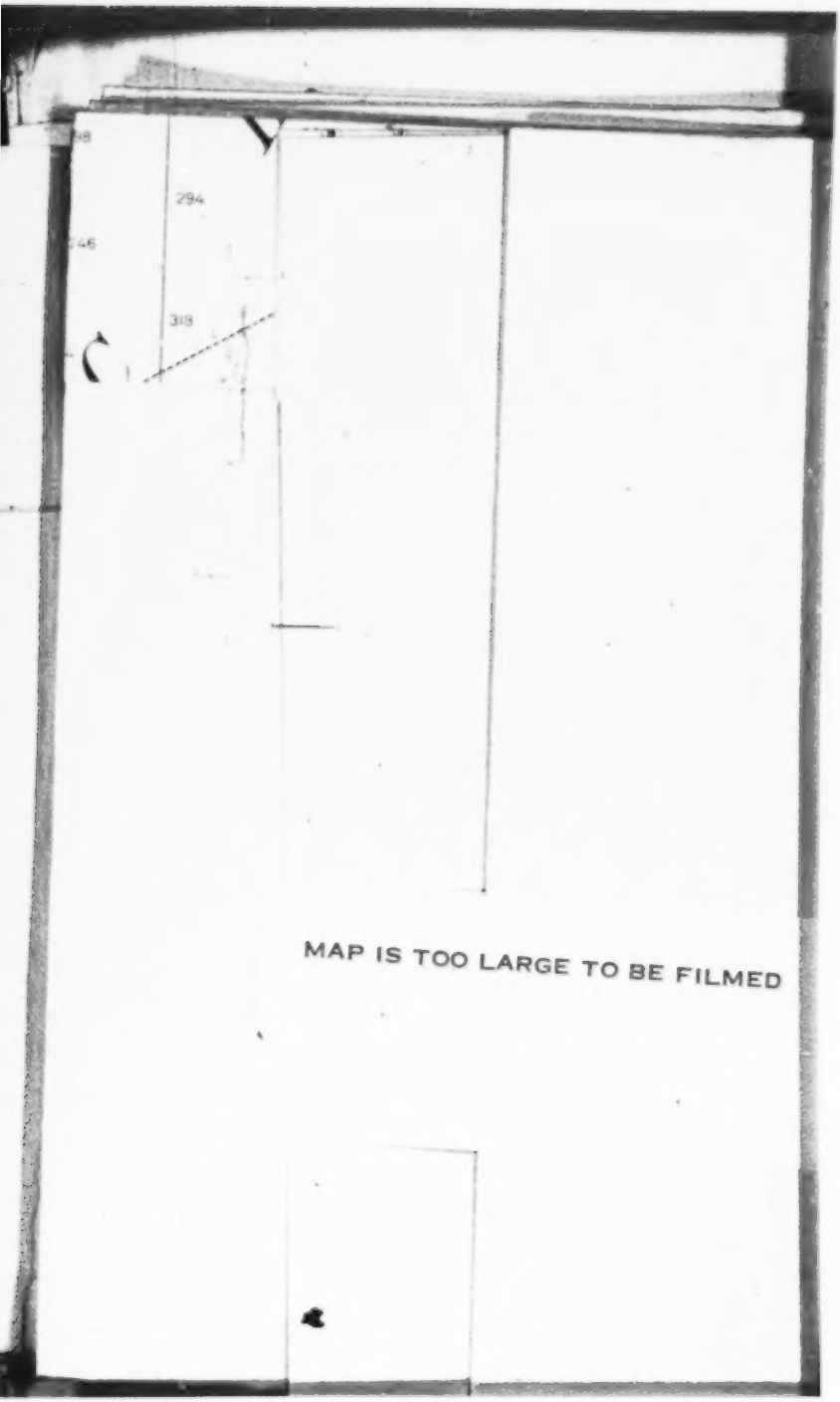
JUDGMENT
FILED
Feb. 10, 1910

C. A. Budlong
Clerk of the Circuit
Court for Marinette
Co. Wis.

The motion for judgment coming on for hearing in the above entitled action at a regular term of said court held at the Court House in the City of Marinette, Marinette County, Wisconsin, on the 31st day of January, 1910, Messrs. Feeney & Miller and W. B. Quinlan appearing for the plaintiff, and John E. Tracy and M. J. Doyle appearing for the defendants, and after hearing the arguments of counsel, and being advised in the premises, and the court having ordered judgment in favor of the plaintiff and against the defendants,

Now, on Motion of Messrs. Feeney & Miller, and W. B. Quinlan, plaintiff's attorneys,

IT IS ADJUDGED: That the plaintiff, Frank Seidel, do have and recover of and from A. B. Bedell and Frank Riser, the defendants, the possession of the property described in the complaint, as follows: Fifty (50) fish nets, together with the sum of six cents as damages as assessed as aforesaid, for such detention, and in case a delivery cannot be had of said property, then that said plain-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MAP IS TOO LARGE TO BE FILMED

tiff have and recover of and from the said defendants the sum of three hundred dollars ($300), the value of his said property in addition to his said damages, together with the sum of Forty Six Dollars and Seventeen Cents, the costs of this action.

Dated this 8th day of February, 1910.

By the Court:

C. A. Budlong
Clerk.

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys, A. J. Bieberstein, Special Counsel for Wisconsin, and Meredith P. Sawyer, Special Counsel for Michigan, that the above and foregoing record sets forth accurately in narrative form the testimony of the witnesses and exhibits introduced in evidence by the parties, pertinent to the issues raised by the exceptions to the Report of the Special Master which the parties have filed herein.

It is further stipulated and agreed that either party may incorporate in its brief any portion of the testimony or any exhibit in said record which it deems material to said issues, and which has not been herein set forth.

Dated this 1st day of March, 1935.

A. J. BIEBERSTEIN,
Special Counsel for Wisconsin,

MEREDITH P. SAWYER,
Special Counsel for Michigan.

FILE COPY

Office Supreme Court, U. S.
FILED
JAN 2 1936
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

In Equity

No. 12 Original

Before Honorable F. F. Faville, Special Master

STATE OF WISCONSIN,

Plaintiff,

v.

STATE OF MICHIGAN,

Defendant.

JOINT MOTION OF PARTIES FOR TIME TO SETTLE RECORD, FILE BRIEFS AND SETTLE TIME FOR ARGUMENT ON EXCEPTIONS TO SPECIAL MASTER'S SUPPLEMENTAL REPORT AND PROPOSED DECREE

JAMES E. FINNEGAN,
Attorney General of Wisconsin,
JOSEPH G. HIRSCHBERG,
Deputy Attorney General of Wisconsin,
J. E. MESSERSCHMIDT,
Assistant Attorney General of Wisconsin,
ADOLPH J. BIEBERSTEIN,
Special Counsel.

DAVID H. CROWLEY,
Attorney General of Michigan,
EDWARD A. BILITZKE,
Assistant Attorney General of Michigan,
MEREDITH P. SAWYER,
Special Counsel.

MAYER PRINTING CO., MADISON, WIS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

In Equity

No. 15 Original

Before Honorable F. F. Faville, Special Master

STATE OF WISCONSIN,

Plaintiff,

v.

STATE OF MICHIGAN,

Defendant.

JOINT MOTION OF PARTIES FOR TIME TO SETTLE RECORD, FILE BRIEFS AND SETTLE TIME FOR ARGUMENT ON EXCEPTIONS TO SPECIAL MASTER'S SUPPLEMENTAL REPORT AND PROPOSED DECREE

Now comes the above named plaintiff, State of Wisconsin, by its attorneys and the above named defendant, State of Michigan, by its attorneys, and jointly move the Court upon the filing of the Supplemental Report and Proposed Decree of the Special Master in the above entitled cause to enter an order specifying the time within which a record may be settled, supporting the exceptions filed to said report and proposed decree by the plaintiff, fixing the time within which the parties hereto respectively may file briefs thereon and further setting a date for the ar-

gument upon such exceptions to the Supplemental Report and Proposed Decree of said Special Master.

Dated this 30th day of December, 1935.

Respectfully submitted,

JAMES E. FINNEGAN,
Attorney General of Wisconsin,

JOSEPH G. HIRSCHBERG,
Deputy Attorney General of Wisconsin,

J. E. MESSERSCHMIDT,
Assistant Attorney General of Wisconsin,

ADOLPH J. BIEBERSTEIN,
Special Counsel.

DAVID H. CROWLEY,
Attorney General of Michigan,

EDWARD A. BILITZKE,
Assistant Attorney General of Michigan,

MEREDITH P. SAWYER,
Special Counsel.

FILE COPY

Office Supreme Court
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CHARLES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

In Equity
No. ~~13~~ 12 Original

Before Honorable F. F. Faville, Special Master

STATE OF WISCONSIN,

Plaintiff,

v.

STATE OF MICHIGAN,

Defendant.

ABSTRACT OF TESTIMONY AND RECORD MADE BEFORE THE SPECIAL MASTER PERTINENT TO THE SETTLEMENT OF THE DECREE

JAMES E. FINNEGAN,
Attorney General of Wisconsin,
JOSEPH G. HIRSCHBERG,
Deputy Attorney General of Wisconsin,
J. E. MESSERSCHMIDT,
Assistant Attorney General of Wisconsin,
ADOLPH J. BIEBERSTEIN,
Special Counsel.

DAVID H. CROWLEY,
Attorney General of Michigan,
EDWARD A. BILITZKE,
Assistant Attorney General of Michigan,
MEREDITH P. SAWYER,
Special Counsel.

MAYER PRINTING CO., MADISON, WIS.

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Direct Examination .....
Cross Examination .....
Re-direct Examination .....

Stipulation of parties pertaining to record.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

In Equity

No. 15 Original

Before Honorable F. F. Faville, Special Master

STATE OF WISCONSIN,

Plaintiff,

v.

STATE OF MICHIGAN,

Defendant.

ABSTRACT OF TESTIMONY AND RECORD MADE BEFORE THE SPECIAL MASTER PERTINENT TO THE SETTLEMENT OF THE DECREE

Re: Map Exhibits

Two map exhibits were offered in evidence with lines projected thereon, known as Exhibits A and C, and the testimony of the various witnesses refers to one or the other of these exhibits. All of the lines shown on these exhibits which affect the issues here presented, have been projected upon the map attached to the Master's Supplementary Report and Proposed Decree, and all references in the transcript of testimony hereinafter following refers to the points and lines described on the map attached to the Master's Supplemental Report and Proposed Decree, in lieu of reproducing Exhibits A and C.

EARL M. NISEN, called as a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION:

My name is Earl M. Nisen. I am a Civil Engineer and at the present time am Senior Engineer in the United States Engineering Department at Milwaukee. I have held that position 27 years. During this time I have been working with lake surveys. I am familiar with the area in Green Bay of Lake Michigan.

I prepared Exhibit C, which is United States Lake Survey Chart of Green Bay. I projected some lines upon said chart. The dotted line is what I call the mid-line of Green Bay determined according to the mid-section method. that is I drew lines one-half inch apart across the Bay at right angles to its axis and then determined the mid-point of each of all those areas of water and drew the dotted line through those mid-points. That dotted line passes over Chambers Island, that is ignoring the island. The bend of said line southwesterly in the vicinity of Whalesback Shoal is caused by the fact that there is an indentation in the Porte Des Morts passage.

The line on said exhibit in solid black is what I call the nearest land method. That represents the shortest distance from the nearest point of land on each shore. Death's Door bluff for example would be a control for some distance north and south of it. The shore of Washington Island and Boyer's Bluff would be another control. Getting around the bend at the north end of Boyer's Bluff and Peninsula Point would be a still further control, until the influence of St. Martin's Island is obtained in connection with Boyer's Bluff, and later Rock Island.

The solid line is affected by control of the land areas on both sides of it to the middle of Lake Michigan. On

Exhibit C it has been controlled nearly 25 miles. The points used in establishing the line to Lake Michigan are Rock Island and St. Martin's Island as long as they are a control, and then Poverty Island.

Northwest of Boyer's Bluff upon Exhibit C there is a lettering stating "combined methods." The nearest land method line and mid-section line coincide there. The dotted line in the neighborhood of the Driscoll Shoal is carrying the mid-section method around the north end of the Bay. I then dropped it in favor of the nearest land method, which proceeds out through the Rock Island passage.

Q. Assuming that a straight line was desired for a boundary from a point 2 miles west of Chambers Island light, equally giving equality of division of the bay, to a point westerly of the Rock Island passage and to intersect a line proceeding through the center of the Rock Island passage, would such a line follow approximately the solid black line on this chart?

A. That would divide it approximately equally, yes.

Q. Could such a line conveniently be projected toward the Minneapolis Shoal on that course? Toward the Minneapolis Shoal?

A. Yes; but that would be a little too far west.

Q. What point would you suggest, in the northern part of the bay?

A. I would—

Q. To give equality of division of the bay.

A. I would suggest a line between Minneapolis Shoal and Chamber's Island light.

Q. Chambers Island light is on the island, however, isn't it?

A. Yes.

Q. And the island, of course, is Wisconsin.
A. Yes.
Q. And there is shoal water around it?
A. Yes, sir.

You could not project a line from Chambers Island light and not pass over Chambers Island or any part of it to the south, but you could to the north. The light is right at the shore and such a line would pass over an infinitesimal amount of land. That would be a reasonable dividing line between the two areas. You would not have a reasonable dividing line if you used the point two miles west of Chambers Island light, the point fixed by the Supreme Court of the United States, and then project from that in a straight line through Minneapolis Shoal. Such a line would be too far west. It would be too far west in the middle in the neighborhood of the Whaleback.

I consider the solid black line which passes through the Rock Island passage before it turns over the axis of Green Bay as a reasonable division of the waters in that area.

CROSS EXAMINATION BY MR. SAWYER:

I determined the axis of Green Bay by selecting this course over here to Chambers Island light, marked S SW ¼ W as representing the general direction of the water. After I got to Boyer's Bluff I drew triangles to come around the bend and one triangle beyond Peninsula Point and the basis of those triangles on the Michigan shore was a little more than twice the width of the rectangles used from Chambers Island up; and then I measured half the distance from Boyer's Bluff to the shore line on the Michigan side and platted that in the middle of each triangle.

I spoke of the advisability and feasibility of using the Minneapolis Shoal light as a bearing point, that is the more southerly of the lights on Peninsula point. As to the feasibility of a line drawn from Chambers Island light to the Whaleback Shoal light and then to Minneapolis Shoal light, it is too far East on the Whaleback Shoal. The geographical center line cuts across about the East 1/3 of the Whaleback Shoal. At the next control north of the Whaleback Shoal and for a short distance above that it continues East of the line from the Whaleback Shoal light to the Minneapolis Shoal light.

I wouldn't say that the light on the Whaleback is approximately in the center of the bay. The Whaleback shoal light is approximately ½ mile East of the geographic center of the bay at that point.

Exactly at the cross section of the bay where Whaleback Shoal light exists the geographic center of that cross section is one-half mile west of the light itself, not exactly west, it is slightly northwest.

Q. What can you say, Mr. Nisen, as to the advisability and practicability of a line with a known bearing on the existing lights in that area being used as a boundary?

A. Well, it would have considerable advantage for law enforcement, in connection with fishing.

Q. Would it be readily possible to determine the position of a vessel in this open water area if the boundary had a known bearing on existing lighthouses?

A. Well, within several hundred feet.

Q. Would that be the most feasible method of determining the location, I mean for the ordinary individual?

A. In the absence of buoys.

Q. Unless the line were actually marked with buoys?

A. Yes; and marked on the ice in the wintertime.

Q. Just for the purpose of the record, would you now explain how a man operating a vessel in this open water area could determine on which side of the boundary he was by bearing on a known lighthouse?

A. He would turn his boat so that the compass, with the proper correction for magnetic deviation, would indicate the direction of the boundary, and when he was heading directly on the light he would be approximately on the boundary line, except that there is considerable chance for error in that, up to, I would say, a thousand or two thousand feet at some distance from the lights.

Q. Aside from this chance of error in taking a magnetic course, that is the most practical method of determining your position on the open water, is it not?

A. Yes, sir.

Q. Is that the method in common use by navigators and fishermen?

A. The magnetic course? Yes, sir.

Q. Is there any other feasible method of determining position in this area of the bay than by bearing on the lights?

A. Yes. Mark it with buoys.

Q. I mean, short of the expense of making permanent aids to navigation, would it be feasible to make permanent marks in that deep water? Could markers be erected that would not be destroyed by the ice, without considerable expense?

A. Yes; but it would be very expensive.

Q. Your department has had experience in attempting to erect lighthouses in this area and has found it pretty expensive, hasn't it?

A. We have erected cribs, and we know it takes an expensive structure to withstand the ice in the winter-time.

Q. Those are usually erected on shoals, or near shoals, are they not?

A. Well, yes, and at entrances to harbors.

. . . . .

Speaking of the section of the line on Exhibit "C," which is marked combined method, just to the northwest of Washington Island, I can say that such a line would not be practical, and could not be readily located by the ordinary fisherman. He would not readily be able to tell on which side of such line he was.

SPECIAL MASTER: Is it feasible and practical, especially is it practical, to establish a line through the area you have just referred to that would bring substantial equality in the water area and still be one that could be readily, or reasonably readily, ascertainable by fishermen in that area? People that were navigating there, could they tell from such ordinary appliances as they have whether they were on one side or the other of such a line?

WITNESS: Yes, sir.

SPECIAL MASTER: How would that line, if it differed technically, a few feet or rods or even portions of miles, differ in its general course from the one you have suggested here?

WITNESS: I would suggest a line from Chambers Island light running through the black spar buoy at the west end of the Whaleback Shoal, which is a straight line and can be definitely marked. Then I would suggest another line from the spar buoy heading direct to Minneapolis Shoal for the westerly line, the northern terminus of that to be fixed according to the line that is se-

lected from Rock Island Passage. I would then run a line through the Rock Island Passage agreeing substantially with the direction of the black line through the passage back up referring to the black line on Exhibit C.

SPECIAL MASTER: Well, now, how would that differ from the line you have placed on this chart?

WITNESS: That would run just a little bit to the west of the geographical center between Chamber's Island light and Whaleback. It would be slightly west of both center lines about a third of the way to Minneapolis Shoal, and then it would be inside of the combined lines where I have marked it combined methods. Then from the intersection from the line through Rock Island Passage with this line to the Minneapolis Shoal and the black spar beyond it would be generally on the Wisconsin side for the Westerly half of the distance to the passage.

SPECIAL MASTER: Now, at its widest point, what would be the difference approximately between the line you have last suggested and the technical line, if I may call it such, that you have drawn on the map? What I want to know is, what would be really the substantial difference if the line were drawn that way? At its widest point?

WITNESS: One and three quarter miles. The line I have suggested would be south of the northeasterly corner of the theoretical line.

RE-DIRECT EXAMINATION BY MR. BIEBERSTEIN:

Between Whaleback Shoal and Minneapolis Shoal I would say the areas on the east and west side of the line I have suggested are about equal, according to the nearest land method. About 5/8 of a mile is the maximum di-

parture there to the west and about the same distance to the east.

The reason that the line called the mid-section method in the neighborhood of the Whaleback Shoal and to the Northwest of it is drawn somewhat easterly, is that it takes into account a negligible portion of the Ports de Morts passage but it does follow substantially the land line around the north end of Door County crossing and following the west line of Washington Island. If a line were drawn from Death's Door Bluff to Boyer's Bluff similar to the line drawn toward the opening of Little Bay de Noc the line would then correspond with the nearest land methods substantially.

RE-CROSS EXAMINATION BY MR. SAWYER:

Q. Mr. Nisen, as I understand it now, the line that you are now suggesting as a practical line is a line from Chamber's Island light to the black spar buoy on the westerly side of the Whaleback Shoal, and from there on a course to the Minneapolis Shoal, as an equal division of the waters north of Chamber's Island?

A. That is right.

Q. Now, is the point, the black spar buoy on the west or the light house on the east of Whaleback Shoal more desirable as a control point?

A. This is not a light house; it is a buoy.

Q. A gas buoy, isn't it?

A. I would place a lighthouse there in place of the black spar and make it practical. There is no control in that being a black spar buoy. It can be a lighted buoy just as well as a spar.

Q. But as a matter of fact it is a spar; and the light is maintained on that side of the shoal where most navigation passes?

A. Yes, sir.

Q. So that under present conditions that gas buoy will remain there?

A. In all probability.

Q. Mr. Nisen, as a practical proposition, is it not much better for a person attempting to locate a boundary to have a bearing on a light rather than on a spar?

A. You can see a light better at night, yes.

Q. You can also see the can (buoy) easier than you can see the spar?

A. Yes, somewhat easier; in daytime too. My testimony that this line was an equal division had relation to the heavy black line on Exhibit "C." Taking the dotted line, the geographic center line on Exhibit "C," I would be conceding considerable of the area west of that line to Wisconsin, to the north of Chambers Island, and to some extent in the neighborhood of the Whaleback Shoal. My line would not be an equal division.

Q. Would that line that I propose, from Chamber's Island to the Whaleback Shoal and from there to the Minneapolis Shoal, be a more equal division, using the dotted line as a basis? It would be almost exactly an equal division wouldn't it?

A. It would be nearer, but it would be excessive for Michigan to the north of Whaleback Shoal.

Q. Depending on how far north you go, wouldn't it?

A. I am considering the point up to the intersection of the line through the Rock Island passage.

Q. If the northerly course has a terminus at a point directly west of the Rock Island passage, it would make it a fair division, wouldn't it?

A. Yes sir, it would.

Q. Now, what is your suggestion, Mr. Nisen, as to how we would go from a point two miles west of the Chamber's Island light to get on this practical line that we are talking about?

A. I would go on this sailing course to Chamber's Island light, marked Southwest ⅞ West, from the point of departure two miles West of Chamber's Island light until it intersected the other course. There is a spar buoy on the north end of the shoal water at Chamber's Island. From light to light it is a little bit east. It would be a substantial mark and a method of traveling from that point to the course from light to light. It would be perfectly practical to run the line on a course to that stake until it intersected the line between the lights. In that region from Chamber's Island south, Wisconsin is getting considerably the best of the water area in the bay from mainland to mainland.

RE-DIRECT EXAMINATION:

If I were to decide the matter, I would run in some direction from that point of departure two miles west of Chamber's Island light, probably in the direction of that buoy north of Chambers Island.

MR. SAYWER: The black spar, we have been calling that. (Continuing.) The black spar north of Chambers Island, or preferably on the established sailing course marked Southwest ⅞ West, until you intersect whatever line is decided on for the boundary.

SPECIAL MASTER: Where would that pass with regard to the Whaleback, that line you have just described? You say go to the intersection of whatever line is decided on for the boundary. Where is that?

WITNESS: The intersection is down here, a short distance west of Chamber's Island. It is removed every year. They could just as easily have dropped a lighted buoy as a black spar. The dotted line has been referred to by Mr. Sawyer as a geographic center line, is a line which is affected by all the indentations of the coast. It does bend somewhat on the Wisconsin side in the neighborhood north of the Whaleback, and it also bends somewhat to the westerly toward the Michigan shore north of that point, in the vicinity of the printing "combined method."

Unquestionably a straight line is the most desirable line for a boundary and the fewer lines one has the better the boundary would be as long as it coincides reasonably with the proper definition.

SPECIAL MASTER: Just a question or two to help me clear up some practical matters. Suppose we started from the mouth of the Menominee River at the entrance of the harbor to go in a direction East by South and went 7⅛ miles, would that bring us practically to the middle of the bay?

WITNESS: That is almost exactly on that sailing course on the chart marked South by West ⅛ West.

SPECIAL MASTER: How about being half way across?

WITNESS: It is exactly.

SPECIAL MASTER: Halfway across?

WITNESS: Yes, sir.

SPECIAL MASTER: So that if we are to start with that as our base line, and proceed northward in a general way to, roughly speaking, split the bay in two, a line drawn northward from that point, assuming that the

shores are practically parallel, would pass over Chamber's Island, wouldn't it?

WITNESS: Yes, sir.

SPECIAL MASTER: So your proposed line that would pass to the west of Chamber's Island, two miles from the Chamber's Island light, would throw a larger water area to the east than to the west, would it not?

WITNESS: Yes, sir, in that locality.

SPECIAL MASTER: Now, does your line from there northward to the point of intersection with the line that comes through Rock Island passage compensate in any way for that loss of water area, so that, on the whole, your line as drawn, equalizes substanially the water area of the bay? I mean the water area between this base line and the line coming through the Rock Island passage. And if so, where does your compensation come in? Only roughly speaking—I don't care for the exact technical description—but where do you make that back, as we would say?

WITNESS: It is not counterbalanced anywhere between Chamber's Island and Minneapolis Shoal, but there is a very much larger area given to Michigan in the northern end of the bay.

SPECIAL MASTER: Well, assuming that the northern end of our line must be the line through the Rock Island passage, if I assume that as a matter of law, then we are not concerned with how much water there may be north of that line, and that would be true of the portion south of the base line that I have referred to. But suppose we have an area of water that runs north of the base line, that line I have referred to as such out of the Menominee River and up to the line, whatever line we draw through the Rock Island passage westward, would your line split the water area in that region substantially in

half, coming, of course, west of Chamber's Island in order to have no conflict over the jurisdiction over the island itself? Where do we make that back so as to compensate the water area in that portion of the bay and leave it substantially in equality?

WITNESS: Well, the line from Chamber's Island to the spar buoy on the west of Whaleback Shoal I would say would be slightly in favor of Wisconsin; but another line could be drawn from the northern tip of Chamber's Island to that west black spar buoy which will almost divide the area in half.

SPECIAL MASTER: My problem is this. I have the southern boundary line, or water area, with shores, roughly speaking, substantially parallel, at least for some distance. Now, as I understand your testimony, you say the point 7⅛ miles from the mouth of the Menominee river is really the center point of that southern, or base, line. Now the fact that Chambers Island, as an island, has been given to Wisconsin necessitates that we go west of that island with our line, trying to split the bay evenly in two equal parts. You decide, as I understand your testimony and as the opinion of the court indicates, it is wise to go west of Chamber's Island, perhaps two miles. Now, we will proceed northward from there, still endeavoring to split the bay into two equal parts, but the fact is that we have lost some water area by reason of that diversion of the line which we must compensate in some way getting it back so we may then proceed with a reasonably straight line. Do you indicate that on the map, and if so, where do you make it back; and if not, is it of such substantial size and area that equity would require us to make it back? I don't know that I make myself clear.

WITNESS: There is no attempt at compensation for the loss in the vicinity of Chamber's Island or to the south.

SPECIAL MASTER: No?

WITNESS: If that is to be given back somewhere to the north, it would require a line considerably east of any that we have been talking about.

SPECIAL MASTER: East?

WITNESS: At the southerly entrance to Chamber's Island.

SPECIAL MASTER: There are two things that I have in mind that I think must be quite governing. One is, as nearly as possible, to secure equality in the water area; the other is to draw a practical line if it can be done, that will preserve that equality, by tying it to established and usual monuments. I think a sacrifice of a small area of water would be obviously quite proper if we could tie it so that it would be inexpensive and certain as to where the line was. It is your help on that problem that I am most concerned about.

WITNESS: It is quite a problem to compensate that.

SPECIAL MASTER: I see we do lose some water area by going west of Chamber's Island two miles.

WITNESS: Unquestionably.

RE-CROSS EXAMINATION BY MR. SAWYER:

Q. Can I ask this question? Would the changing of the line proposed by you from the black spar at Whaleback Shoal to the light on the east end of Whaleback Shoal approximately compensate for the loss which Michigan is occasioned by passing the line two miles west of Chambers Island? Approximately, I say. Roughly.

A. I wouldn't think that that was equal to the loss west and south of the island; no.

Q. In other words, Michigan wouldn't be getting back quite as much as they lost?

A. No, not if that is to be considered to the south.

Q. The compensation would be less than the loss?

A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. BIEBERSTEIN:

Q. I observe that the solid black line north of Washington Island is considerably nearer to Washington Island than the mainland of Michigan is north of it. Does not the water area north of that solid black line more than compensate for the loss to the south and west of Chambers Island?

A. It is many times in excess of it.

Q. And isn't there a difference in the situation in the north end of Green Bay and south of the mouth of the Menominee River in which Wisconsin is interested and that is a part of Wisconsin, that is, the coasts on all sides of the water in that locality are Wisconsin, whereas in the north end of the bay one side is Wisconsin and one side Michigan?

A. Yes.

Q. Do you think those two situations are alike at all?

A. They are not alike at all geographically.

Q. I mean from the standpoint of the argument made that there is no division south of the Menominee river?

A. Well, everything south of Menominee would be entirely a Wisconsin matter.

Q. All of the mainland around it is Wisconsin?

A. Yes, sir.

Reading the language of the opinion which states that you shall pass "thence to and along the line in or near the middle of the bay to a point West of the Rock Island passage, thence Easterly by courses and distances to be designated through that passage to the boundary in the middle of Lake Michigan." I think that the word west does not mean exactly west, but is just a general statement of location.

Q. Then, as I understand from your testimony, you think the most practical boundary which can be determined here, beginning at this point two miles west of the Chambers Island light, is to proceed thence on the steamboat course marked Southwest ¾ West, proceed northerly on that course until you intersect a line drawn from Chambers Island light to the black spar on the northwest side of the Whaleback Shoal; then proceed along that line to the black spar on the northwest of the Whaleback Shoal, and then proceed on a line drawn directly between the black spar on the northwest of the Whaleback shoal and the light on the Minneapolis Shoal, and proceeding along that line until it intersects a line through the Rock Island passage in approximately the position that you have shown by a black full line going to the Rock Island passage on Exhibit C and going over the St. Martin's Island shoal light.

A. Will you letter these various points?

Q. Let us label that C, if you will? And will you label the intersection of the steamboat course with the line between the black spar and the Chambers Island light as Y? Will you label the point on the black spar as D? You have already labeled the intersection of the line from the black spar to the Minneapolis Shoal with the line from the Rock Island passage. Your

thought is that an equitable boundary from the point two miles west of the Chambers Island light would be line CYDa' and that the line turns at point a' and go on a straight line through the middle of the Rock Island passage, passing over point H?

A. Yes, sir.

RE-CROSS EXAMINATION BY MR. SAWYER:

Q. Does that line compensate for the loss of area to Michigan below Chambers Island?

A. No, sir.

Q. And if you were going to compensate for that loss would the line bend to the light on Whaleback Shoal approximately to make the compensation?

A. It would be less than is required to compensate it equally.

Q. That boundary would also include a great deal of water area north of an east and west line drawn through the center of the Rock Island passage, would it not?

A. I don't understand that.

Q. That line would include in Wisconsin a large water area which would be north of an east and west line drawn through the center of the Rock Island passage?

A. Yes, sir.

The water area lying north of the line a'H would many times more than compensate for the loss of water area in the neighborhood of Chambers Island.

RE-DIRECT EXAMINATION BY MR. BIEBERSTEIN:

Q. By "middle of the Rock Island passage" are you referring to the light or to the middle geographically?

A. The east and west line RH is drawn through the light. The St. Martin's Island Shoal light. The geographical center line would be south of the light three-eighths of a mile. The center of the Rock Island passage is halfway between Rock Island and St. Martin's Island, but this is not true for navigation purposes. I didn't draw the line through the light at anybody's instructions. Mr. Sawyer came into my office and talked to us about the matter and wondered if we might help a little. I drew Exhibit C on my own motion. No one instructed me to. I was interested in the problem as in my district.

R. E. SMITH, called as a witness on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. SAWYER:

I am, at present, State Geologist in charge of the Geological Survey Branch of the Conservation Department of the State of Michigan. I have been in that work for twenty-five years, and am familiar with the Green Bay area and exhibit "A." I caused to be placed on Exhibit "A," the red line K L M R and H. The controls for this line are the Chamber's Island light and the Whaleback Shoal light, and the point established by the Supreme Court decision, two miles west of the Chamber's Island light and the spar buoy that is north of Chamber's Island Shoal. The line M H is a line drawn parallel to the line A B at the south end of the disputed area. It is drawn westerly from St. Martin's Shoal light until it intersects the line K L. M. This line was placed on the chart by me as a proposed boundary.

I computed the area of water surface lying to the east of the line A B C K L M H and the

water area lying to the west of that line, with the base line and top line projected across the bay, in units of area. These measurements were made with a planimeter, an instrument used for measuring areas, and I have indicated on Exhibit "A" the points and contours to which the measurements were extended. Aside from this the planimeter generally followed the shoreline, except for Washington Harbor, which we crossed directly from point to point because that bay is longer than it is narrow. This measurement was made in units of unknown size and we did not reduce them because we were interested in getting at a comparison of the areas only. They were measured in similar units and we arrived at a ratio of area on one side or the other of the line. In the Michigan area there are 126.3 units, and in the Wisconsin area 130.35 units. The ratio is 100:103. Three per cent in favor of Wisconsin.

The water area given to Wisconsin by this proposed boundary line, A B C K L M H, is larger than that given to Michigan. It is three per cent larger than the Michigan area. It would be possible to shift the line from point "L" northerly to give it a bearing on the Minneapolis Shoal light and still use the line lying parallel with the base line on the north. I will place such a line on the map. That would result in increasing the water area given to Wisconsin and would in no way decrease the area given to Wisconsin. That would be with the thought that the increase in the water we surrender in that small water area would be offset by the benefits in having a straight line from here to here (indicating Whaleback Shoal light and Minneapolis Shoal light). We also made measurements with the planimeter to indicate the ratio of water area given to Michigan and Wisconsin, respectively, by the line A B C D E F G. Wisconsin's area would be 167.3 units,

and the Michigan area 129.7 units. Wisconsin would have 37.5 units more.

CROSS-EXAMINATION BY MR. BIEBERSTEIN:

I measured these areas by a planimeter by running the needle along the shoreline, and following the exact shore it gives you the area in units. I did that on this chart. The first measurement I gave you, I used the red line as the center line, my northerly line was H M extended to the west shore which eliminates the northern end of Green Bay, or that part northerly of that line.

RE-DIRECT EXAMINATION BY MR. SAWYER:

I also left out everything south of the base line extended out of the Menominee river.

RE-CROSS EXAMINATION BY MR. BIEBERSTEIN:

The line M H is not perpendicular to the axis of the bay, but parallel to A B. A B is not perpendicular to the axis of the bay. That is the line out of the mouth of the Menominee River.

RE-DIRECT EXAMINATION BY MR. SAWYER:

Before drawing the line C K L M H, I have for my own purposes attempted to locate a geographical center line in that portion of Green Bay. This line (C K L M H) was projected between lights and points that could be recognized by fishermen and others, so that the line would not depart very much from the geographic line. In other words, there would be a counter-balancing.

Q. Your present line is pretty close to the geographic center line, is it not?

A. Yes.

Q. And would pretty equally divide the area on one side or the other?

A. Yes, or we wouldn't have these computations so close.

SPECIAL MASTER: I am concerned about your preliminary line. As I understand, the line through Rock Island passage that you consider here is a line directly parallel with what we call the basic line running out of the Menominee River.

WITNESS: Yes.

SPECIAL MASTER: And you simply draw your point of intersection where that line as extended would intersect with the line that you have otherwise described on the map as tying it to these lights? Is that right?

WITNESS: Yes.

Q. And this line, Doctor, M H, is based on the St. Martin's Island Shoal light?

A. Yes.

Q. Rather than on the center of the passage?

A. Yes.

Q. And at the southeastern end it swings slight to the south?

A. Yes.

Q. And what was the purpose of terminating that line on the east as you have done?

A. As a feasible line for a navigator to use.

Q. So that as a practical point it would be easy for a navigator to determine his position as to which side of the boundary he was on?

A. Yes.

SPECIAL MASTER: I suppose we have technically involved here the balance of the line from the center of Rock Island passage.

WITNESS: My interpretation was that you come opposite this point. I used that in the reconnaissance.

RE-DIRECT EXAMINATION BY MR. SAWYER:

The line M R H is not a true east and west line. It is parallel to the line A B of which the course is East by South, so that the course of this line (M R H) would be East by South, or in the westerly trend, West by North. The point "H," on which this line is based, would be north of the center line of the passage, going directly through it. A point on the line K L M due west of the center of the Rock Island passage would be somewhat south of "M." By depicting the line M R H we have conceded to Wisconsin more water area than they would have had we stopped this northerly line at a point west of the center of Rock Island passage. I mean directly west.

Q. If we were to adopt a point directly west, Michigan would gain thereby, and by making the line parallel to the base line, Wisconsin has gained some area.

A. Yes.

By "this point" I meant a point opposite Rock Island Passage. Naturally there is a difference of opinion but I would consider this point at right angles to the trend of the shore. I suspect it is also approximately right angles to the bay or Lake Michigan rather. After I got inside the Rock Island Passage I forgot about that and passed rather closely to Wisconsin. I simply took line M H to parallel line A B assuming that whatever reason the court had for line A B might apply up here. I didn't look for any reason why it might apply. My idea of that

was that we should get to a point directly west of the Rock Island passage. The reason I fell into this idea of tying line M H to line A B was to make them parallel.

The starting point of line A B is a mainland point. We do not have that situation at the north end of the bay. I would say very roughly the axis of Lake Michigan is approximately the same as that of Green Bay. There might be considerable divergence, one would have to plat the course. I did not project the course M H on which I am passing through the Rock Island passage into Lake Michigan to the center thereof, because I think the line into Lake Michigan should be at right angles to the trend of the shore, the shortest line to the center of Lake Michigan.

Q. And for the same reason a line projected through the Rock Island Passage approximately in the position of the black line on Exhibit C, drawn by Mr. Nisen, and about which he has just testified, until it strikes the axis of Green Bay would be the shortest line from the Rock Island passage to the axis of Green Bay, would it not?

A. It would look that way, yes.

RE-CROSS EXAMINATION BY MR. BIEBERSTEIN:

Q. Whatever the course of the line is that comes through the Rock Island Passage, the line that is finally adopted, the identical course should be maintained until the center of Lake Michigan is reached to be fair to the two states?

A. No.

If I were to take the course M H on a line East and West through the Rock Island passage, I would bend that line after arriving outside the passage to get to the center of Lake Michigan. Michigan would gain on this line.

SPECIAL MASTER: Why would you bend it Doctor, I don't believe I understand you?

WITNESS: Because of the wording "point opposite the Rock Island Passage."

Q. Why isn't it as important to get opposite the Rock Island Passage inside the bay as when you are in Lake Michigan?

A. It might be, but the Wisconsin Enabling Act says opposite the Rock Island Passage.

CHARLES H. HUBBARD, called on behalf of the defendant, testified as follows:

My name is Charles H. Hubbard and I am superintendent of the lighthouses for the 12th district, which includes Green Bay, and have held that position since May 1, 1918, and was in the lighthouse service previous to that. From November, 1892, I was in command of a lighthouse steamer navigating in these waters and am very familiar with all the lights in this area and the conditions surrounding them. The purpose of the government in maintaining these various lights and what controls them in the points in which they locate them, is as aids to mariners. The location is decided on, the best position to give this aid to mariners in navigating the waters. As time has gone on, we have practically accomplished that at least one light is visible from almost every location on the water, so that in the area in Green Bay from the Menominee River northward up past the Rock Island passage, there is scarcely a position on the waters of Green Bay but what you can locate at least one light. If a man was about to set nets for the purpose of fishing he could locate his position and ordinarily tell whether he was on the Wisconsin or Michigan side of a given line by running his fishing vessel by time, that is, if

a vessel would make 12 miles an hour he would know he was making a mile in five minutes. If he was passing a light at a given speed he could catch what is ordinarily termed a four point bearing. In other words, if he is heading north for instance, and if he would catch his time when that light bore nearest, knowing he was making a mile in five minutes, if he continued on the same course until he was abreast the light, he just makes one part of a triangle. If he is coming along here making a mile in five minutes when this lighthouse is four points on the bow he catches his time, when it is a beam he catches his time again, and he knows then that going 12 miles an hour, that he has traveled this end of that triangle and that gives very close to his position here when he is abreast of that light. I would say that the location of the lighthouses are the predominant characteristics in locating yourself on the water, practically every move that is made by navigators or a fisherman for the purpose of locating his fishing ground or his position is tied up to a lighthouse or maybe a buoy marking a shoal for that buoy is in the same spot every year and if he hasn't a lighthouse to see, he has a buoy, which is equivalent to a lighthouse in locating himself. I would say a lighthouse is more desirable than a buoy in locating yourself. It is more visible at night and is usually visible at a greater distance. The Menominee light is a permanent structure also the Green Island light, the gas blinker west of Chambers Island would depend on the seasons, and it might be moved. It has been moved in the past due to dredging in that locality. The light on Chambers Island is permanent.

The gas buoy east of Whalesback Shoal has been a permanent mark and located there every year. These buoys are all set by instrument. Their location is found by sextants which afloat is similar to handling a transit

ashore only reversing the position. We set them by degrees and minutes of arc. The resetting of the gas buoy on Whaleback Shoal every year is very close to the identical position, very very close, and that would be true of St. Martin's gas buoy at the entrance of Rock Island Passage. There are also permanent lights on Rock Island, Pottawattamie, and Boyer's Bluff, and Washington Island is also permanent. Referring to Exhibit A, to the line A B C K L M H, that line looks very equal to me as an approximate equal division of the waters in that area. I think the line K L in the vicinity of Whaleback Shoal is better than the line C D, because the buoy is high and visible at a greater distance than the black spar at D and the bearing on Chambers Island light would also be better than a point 2 miles west of Chambers Island light. Also the fact that the short line C K passes the spar would also give us another mark. On the line L M north of L, it would be at rare intervals that the Chambers Island light would not be visible and then would still have a bearing so that you could tell whether you were east or west of the mark. The St. Martin's shoal light would hardly be visible from there. The new light that we are putting on Minneapolis Shoal would be. This new light is in the same location as the gas buoy now on Minneapolis Shoal. This lighthouse is right on Minneapolis Shoal and will be visible at night for many many miles. It would be desirable as a bearing. A line from Whaleback Shoal light to this light would be most desirable, I would say if you are trying to establish a boundary that one can see. And that line could be used up to a point where it had a bearing on St. Martin's light. My idea of the proper course to pursue after leaving St. Martin's light in connection with the language of the Wisconsin Enabling Act which defines the boundaries of the territory of Wisconsin as coming from the south-

erly along the middle of Lake Michigan to a point opposite the Rock Island Channel, would be to take and draw a line at right angles and fetch up into the Rock Island passage. I should think that the most practical way to do would be to take and draw a line at right angles from this line over to the Rock Island passage.

SPECIAL MASTER: Would that be a feasible line?

WITNESS: Absolutely yes.

In drawing this line at right angles I would take the trend of the shore of the lake near Rock Island and would pay no attention to the eastern shore of Lake Michigan.

I would conclude from the language in the opinion of the court "proceeding along line near middle of the bay to a point west of the Rock Island passage," that the point was due west from the center of the passage. It doesn't say channel. The channel is on the southerly side of the passage. The nearest point in Rock Island passage from land to land is approximately from Pottawattamie light to the southwest corner of St. Martin's Island. The line M H intersects that slightly south of the middle and is not quite at right angles to it. A line at right angles to the middle of that would be as desirable from a Wisconsin fisherman's standpoint because it gives him more territory. It would be just as feasible from the standpoint of law enforcement. The line M H has a known bearing on a gas buoy which makes it more readily determinable.

RE-CROSS EXAMINATION BY
MR. BIEBERSTEIN:

Q. I want to read that phrase to you again, "from a point two miles west of Chambers Island light, thence to and along a line in or near the middle of the bay to a point west of the Rock Island pas-

sage." I understood you to say that you thought that meant due west of the Rock Island passage?

A. Undoubtedly. If it was westerly it would give you a chance to go up and down a little bit.

Q. Now, suppose the next phrase is this: "thence easterly," not east, "thence easterly by courses and distances to be designated through that passage to the boundary in the middle of Lake Michigan." Now when you add that phrase to it, does not that indicate to you that they did not mean a point due west?

A. It specifically says west, and to a sailor that is due west. Easterly is not due east. Easterly might be a point or two points to the north or south of due east.

Q. If you are at a point due west of the Rock Island passage, how are you going to proceed easterly through the passage? You are going to proceed east, are you not?

A. Not due east.

Q. Not due east?

A. No, for the reason that if you did you would fetch up on the shore. You have got to steer southerly of east, in an easterly direction, but in a course South of East.

Q. Do you mean it is impossible to draw a line east and west through the Rock Island passage?

A. No, I don't. You can draw a line, but you don't keep in the channel.

I would take point H as the center of Rock Island Passage for practical purposes. The trend of the Rock Island passage is not East or West but is about Southeast and Northwest, and is pretty near perpendicular with the axis of Lake Michigan, and the axis of Green

Bay. The axis of Green Bay and that of the center of Lake Michigan are very near parallel. The shortest line connecting the axes of those bodies of water would be pretty close to a line perpendicular to the axes of both. Such a line would not pass through the Rock Island passage East and West.

Q. What I am trying to get at is this, the Michigan red line apparently proceeds on the theory north of the Chambers Island light that it must be in a direct line with that light, that is that that would make calculation somewhat easier to be on a direct line between Chambers Island light and the lighted buoy on the Whaleback.

A. I would say so. You have definite marks and it would be easier to calculate that line than an emergency spot not marked out. The gas buoy on the Whaleback could be seen from point K in ordinary weather, and X and L are definite points which one can see and come right along on that line.

Q. Would it surprise you if I told you that I couldn't see it two or three miles away?

A. No. I have seen it 12 miles away at night.

Both the black spar and the lighted buoy on the Whaleback are placed there by my department. I don't feel that the boundary should be placed on the east side of the Whaleback over the general vicinity of that lighted buoy simply because my department placed the light on the east side of it. I have made no calculations about the equality of division of waters which would result from the establishment of the line K L M.

I am talking about locating a line between definite marks. It would not be difficult to locate your position from a point two miles west of Chambers Island light to

some other light if you are able to see several lights, such as the light west of Chambers Island and the Chambers Island light. Along the same line I think the Minneapolis Shoal light would be a mighty good bearing to use on this boundary, and the Whaleback Shoal light and the Chambers Island light. There would be no difficulty in placing a lighted buoy on the west side of the Whaleback Shoal as well as the East side if we had one to drop. For many years there have been requests to mark the Whaleback Shoal with a permanent mark in other words, a lighthouse and a fog signal. If we do it will be similar to the Minneapolis Shoal light and fog signal and will take the place of the Whaleback Shoal gas buoy. We have recommended that to the Lighthouse Bureau and just a couple of days ago we have again recommended that funds be obtained to build it. I look in the near future, they have written me about it, that there will be a permanent lighthouse established there in lieu of the Whaleback Shoal gas buoy visible for 10 or 15 miles in the daytime.

Q. As I understand your testimony, if I have the ordinary instruments of a navigator I can find my position; whether the line ran over the lighted buoy on the Whaleback Shoal or whether the bend of the line was one mile northwest of that light, I could find my position?

A. Oh yes, if you would see this spar buoy.

Q. Suppose I did not see the spar buoy but did see the light, and the line ran over the spar buoy, could I locate my position?

A. Approximately.

Q. If I had the ordinary instruments of navigators, couldn't I do it fairly accurately?

A. Your instruments are such on the lake that you have got your compass and a log. Fishermen don't carry a log as a rule.

Ordinarily a fisherman determines his position by time as a run out, so many hours and so many minutes from shore and they base their location almost entirely on that and the depth of the water and also on lights, and also, fishermen are wonderful when they can see certain headlands and points, in locating themselves. They have certain location marks in addition to the lighthouses and buoys and they use these location marks when lighthouses and buoys are not visible.

When one moves up the bay and makes a right turn through the Rock Island Passage into Lake Michigan, there is 3 times as much water area on the left side as on the right, assuming that a right angle turn is made, and less water on the right than on the left if the turn is less than a right angle. There is more water to the northwest of the line L M H than to the Southeast.

It looks as though there is a good deal of water north and west of the line M H which is nearest to Wisconsin, but under the Michigan proposal of the line L M H, would fall into Michigan. The line M H if it was moved up perpendicular to the axis of the bay, would throw a little more water into Wisconsin.

Q. Do you think that the line L M H as a practical boundary treats the fishermen of Washington Island fairly or unfairly as compared with those of the islands or the Michigan mainland with respect to equality of water area?

A. I think it is hampering them here a bit for I imagine the fishermen go out farther at certain times of the year, farther to the northward and would cross the boundary if L M H was the boundary line, if they wanted to get out into deeper water the fishermen from Washington Island. There are no fishermen out in there now at this time of the year. The only fishermen that would be around

St. Martin's Island now would be fishermen from Washington Harbor on Washington Island or Fairport on the mainland of Michigan.

I agree that the Minneapolis Shoal lighthouse would be a good bearing for this boundary. So far as finding position is concerned, if a lighted buoy were dropped at the black spar on the northwest of the Whaleback Shoal, that would be just as good a place as the lighted buoy on the southeast side. I would say that a line from a definite mark like K to another definite mark would be a great deal better than from an imaginary point of departure at sea. I am not figuring on any division of water. I am just trying to show a definite mark. The Chambers Island light and the buoy at point L are ordinarily visible all along the course between the two a night, but not in the daytime or in the winter. The buoy at L is picked up in the winter and is away from the station during the winter. We leave a spar buoy in the fall when we pick up the gas buoy, so the spar buoy is visible a certain distance unless it is swept out by the ice or as is generally true, covered with ice fields and underneath the ice. It is desirable to have both of the lights visible in order to plat your course. It is desirable to see two in order to calculate your position. If your compass is correct, one would be sufficient but ordinarily compasses are not sufficient on fishing vessels. If you had an accurate showing of error of your compass you could head your ship upon the light such as Chambers Island light and reverse the course, and if you knew your error and handled your ship and compass to comply with the error, you could head on Chambers Island light and you would know that Whaleback Shoal light was directly the opposite course. If I knew I was west of the Chambers Island light and Chambers Island light was visible to me, and I knew

the course of the line C D and I knew my compass, I could ordinarily determine my position with reference as to whether I was southeasterly or northwesterly of the line C D. If you had a positive departure point obtained by cross bearing from Chambers Island light and Chambers Island gas buoy, and you steered a proper course then you could do that.

The value of a light at each end of a given line depends entirely upon whether you can see them both. You can calculate from one if you know your compass. Assuming that I am at a point north of point K on the line K L, I don't think I have any more difficulty determining the location of line K L than I would if I was on line C D at a point northerly of C and the only light I could see in either instance would be Chambers Island light.

RE-DIRECT EXAMINATION BY MR. SAWYER:

The fact that when I am on line K L and I have a known bearing on the light would tell me whether I am East or West of the red line if my compass is correct, but on the blue line I would have to know my distance from the light, or be able to see two lights or points from which I could plat my position on the chart. If I could only see Chambers Island light I would be unable to tell my position unless I knew the distance from the light. One of these gas buoy lights, the one on Whaleback Shoal, costs in the neighborhood of $3500.00, and approximately $100 a year to maintain without including the costs of the equipment which is required to pick it up and put it back or the services of the tender. The cost of the lighthouse tender would come up to $300.00 a year approximately. The bureau would not permit the placing of the buoys here which had no relation to navigation for the purpose of marking a boundary. I can

only answer for myself and not for the bureau, but the law specifically states that these aids are for the safe navigation of vessels. Consequently I would have grave doubts if the bureau would ever put any mark there for that purpose.

RE-CROSS EXAMINATION BY MR. BIEBERSTEIN:

The lighted gas buoy at Whaleback Shoal is maintained there approximately 7½ months in the year. The principal practical value of having the boundary run from one light to another is when you can see one light from another or on any position between the two when you can see them both. One is sufficient but not as good as two for a departure and arrival point.

Q. Suppose I was over here on the Door County peninsula, and I have traveled in a northwesterly direction and I saw Chambers Island light, would it be difficult for me to determine when I had crossed that red line?

A. Not difficult if you take your time; if you were running on time and knew the speed of your vessel it would not be difficult.

Q. If I knew that I would not need the light at all.

A. If you knew the time and speed of your vessel you could come approximately very close to the line.

Q. The red line?

A. Yes.

Q. I wouldn't need any lights at all to tell me where I was?

A. It would be an additional surety for you to have them.

Q. Assuming that I did not keep that record at all but just traveled out there, couldn't I find the blue line just as easily as I could the red?

A. Yes, if this island was visible, or the Chambers Island light was visible, or Chambers Island was visible, or Whaleback Shoal was visible, you could get a bearing on it.

Q. My point is that the value of these lights in the course of the boundary depends upon two of them principally rather than one. At a given time you should see two of them?

A. That would help in locating whether or not a man was on one side of the boundary or the other, yes indeed, more so than one. Two would be better than one.

Q. And if I could only see one it would be almost as easy for me to find a line which I knew was two miles west of that light as to find a line which I knew passed through that light, wouldn't it?

A. Well, there is an element of doubt in that. You could take a bearing on a light, one light, but it would not be as positive as to get on the line drawn between two of the lights. You could get a bearing on one; you could tell approximately from one light.

RE-DIRECT EXAMINATION BY MR. SAWYER:

When the buoys are removed, the surface of Green Bay freezes over solid in that vicinity, generally so the buoys are there about seven months of the year, and most of the remainder of the year the surface is frozen, and if you had a known bearing on Chambers Island light you could go out and set Christmas trees to mark the boundary. You wouldn't even need a transit, you could do it with a compass. If the government replaces this Whaleback Shoal gas buoy with a permanent crib light that would be a year around light with which the

ice cannot interfere. The Chambers Island principal light is discontinued in the winter and we have an acetylene light that we put up, not as strong, of course, as the summer light. We maintain this acetylene light at Chambers Island during the winter time and also at Green Island because of the all-winter car ferry service into Menominee.

SPECIAL MASTER: Can you locate a point in Green Bay which will be directly west of the middle of the Rock Island passage?

WITNESS: Absolutely, with the aid of a sextant and sextant angles.

SPECIAL MASTER: Could you go from that point through the Rock Island passage in a direct, straight line?

WITNESS: Right ahead of you and due East from that imaginary spot in Green Bay would be the shoal water. The shoal is on the northerly side of the Rock Island passage.

SPECIAL MASTER: The point I had in mind is this, could you bring yourself through the Rock Island passage?

WITNESS: Yes, there would not be anything to interfere with getting into the Rock Island passage with a straight East and West line.

A boat can determine its position in reference to the line M H by simply taking a bearing on point H so long as that boat is anywhere east of point M and so long as he can see the light at point H. There is no other way that you can draw a line through the center of that channel and be able to do that.

F. P. STEINMETZ, called as a witness on behalf of the plaintiff, testified as follows:

My name is F. P. Steinmetz. I am an engineer with the Public Service Commission of Wisconsin. My work consists of supervisory work in connection with water power and valuation work. I prepared Exhibit A and drafted the line A B C D E F G H J.

It is apparent that the axis of Green Bay and that of Lake Michigan are approximately parallel. The trend of the Rock Island passage is perpendicular to the axes of these two bodies of water. As you proceed up Green Bay and make a turn to the right to go out through the Rock Island passage, the larger portion of area is on the outside of the turn. It would be approximately three-fourths, the same as there would be in any turning of a road or highway. If it is a right angle turn the proportion is one-fourth and three-fourths. With an acute angle there would be a smaller angle than an obtuse angle. There is always more area on the outside than on the inside of the turn. In my opinion the line C K M H does not equally divide the waters in that part of the bay, because water which is nearest Wisconsin would be thrown to Michigan by that line. The principle that water which is nearest Michigan is thrown to Michigan and water which is nearest Wisconsin is thrown to Wisconsin, is the basis of the line A B C D E F G H.

If the area of water north of line M H is considered, there is no question that the line L M H gives more area of water to Michigan than to Wisconsin. I see no justification for cutting off the area at the line M H and making such calculations.

CROSS EXAMINATION BY MR. SAWYER:

In making my computations I close the area at the southern end by the court's direction, but that isn't what

you did when you closed it by the line M H extended. It is true that the two banks of Green Bay, the west coast of Green Bay and the east coast of Green Bay are roughly parallel from Marinette up to a line through the Rock Island passage.

We are not doing justice in saying that the area to be divided is that between lines A B and M H because Green Bay does not extend indefinitely to the north. It takes a turn and goes to the southeast. It is not Lake Michigan until you pass through the Rock Island passage.

I believe navigation goes into the lake unless you are going to Escanaba.

There would be no difference between the end of the area caused by line A B and line M H if Michigan extended clear to Green Bay. The line corresponding to the line A B is a line drawn northeast and southwest from Washington Island northeast to point Detour. The line from Washington Island northeast to point Detour denotes the closing of the question of boundary. The opinion has set the middle of Lake Michigan as the end of the boundary. That is merely an extension of this line. I placed the northern limits of the area involved in this litigation as the points of projection that inclose Big and Little Bay de Noc.

I testified that the division of water by the line K L M H was not equal and the basis of that testimony is that I am considering water north of the line M H should be included as part of the disputed area.

SPECIAL MASTER: In other words you are taking into consideration all of Green Bay, the entire portion of Green Bay that lies north of the line drawn out of the mouth of the Menominee River.

WITNESS: Yes.

Q. Isn't it true that under the principal you have announced that there is three times as much area on the outside of a turn as on the inside, Wisconsin is getting three times the area opposite the Menominee River that Michigan is?

A. Yes, that is true. Wisconsin owns the three-fourths outside of that triangle.

Q. Wouldn't that be the equivalent of the situation in the northern end of the bay?

A. If they ran where we have put the line that would be true.

Q. Well, wouldn't it be true without running where you have put the line? You have taken an equalization figure here to make up for that haven't you?

A. No, we have attempted to follow the geographic center.

Mr. Nisen this morning quite independently did the same thing. That is the situation in the lower end of this area and the only reason the water north of the line M H should be considered more than the area south of the line A B is that if the water is closer to Wisconsin property than it is to Michigan then the water should go to Wisconsin.

This principle has not been followed by the court in its opinion in the region of Green Island and Chambers Island. There is water in that region given to Michigan which is much closer to Wisconsin than it is to Michigan, and if this principle is followed the line would have to pass half way between Chambers Island and the Michigan shore.

Q. So that you have got to abandon that theory entirely until you get north of Chambers Island?

A. The court has approximated that rule, making the adjustments which they thought were reasonable.

Q. And can you see any possible connection between your rule of nearest land and the first two courses on this map?

A. They have attempted to go directly toward the center of the channel through the passage.

Q. And split the entire bay in half? They didn't pay any attention to this island, except to dodge Chambers Island.

A. That is considerable. Don't they dodge it?

Q. They evidently were not applying the rule that this line must follow the line equidistant from the nearest land. There is scarcely a point on this line where it is equidistant from land.

A. No, I think not. I believe their whole description of where this line should be up through the center of the bay recognizes that.

Q. Can you see anywhere in the opinion where they say anything about equidistance? They are directing their attention to equality of water.

A. They don't say equidistant from land, but that is in effect what their language does say.

RE-DIRECT EXAMINATION BY MR. BIEBERSTEIN:

I have read the language of the opinion "thence to and along a line in or near the middle of the bay to a point thence easterly by courses and distances to be designated through that passage to the boundary in Lake Michigan."

And I think by that language the court meant to designate a point directly west of the Rock Island passage from which some series of courses and distances

should be continued to end up in the center of the Rock Island passage. I would read that language that it would be a point directly west of some portion of the Rock Island passage but since they say thence easterly that they wish more information on what would be a proper division of the bay from that point on through the Rock Island passage and they are asking us for that.

From the point directly west of the Rock Island passage the procedure is not necessarily east. They say easterly which gives you lee-way. You may go to the north as we have indicated, then to the south again so you finally come through the Rock Island passage to an equal division of water, throwing that water closest to Wisconsin to Wisconsin, and that water closest to Michigan to Michigan.

The line C D E F G H essentially does that.

I think the court intended to give lee-way there. The first course could be directly east but I don't think it is equitable, on the theory that Wisconsin is entitled to share the water north of Washington Island and Michigan is not entitled to share the water south of the Menominee River.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto by their respective attorneys, A. J. Bieberstein, Special Counsel for Wisconsin, and Meredith P. Sawyer, Special Counsel for Michigan, that the above and foregoing record sets forth accurately in narrative form the testimony and exhibits introduced in evidence by the parties pertinent to the issues raised by the plaintiff's objections to the Supplementary Report and Recommended Decree of the Special Master.

IT IS FURTHER STIPULATED AND AGREED that either party may incorporate in its brief any portion of the testimony or any exhibit in said record which it deems material to said issue and which has not been herein set forth.

Dated this 17th day of January, 1936.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

In Equity

No. 12 Original

STATE OF WISCONSIN,

Plaintiff,

v.

STATE OF MICHIGAN,

Defendant.

BRIEF OF PLAINTIFF, STATE OF WISCONSIN ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

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IN THE

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OCTOBER TERM, 1934

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No. 15 Original

STATE OF WISCONSIN,

Plaintiff,

v.

STATE OF MICHIGAN,

Defendant.

BRIEF OF PLAINTIFF, STATE OF WISCONSIN ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

INTRODUCTORY

JURISDICTION OF THE COURT

This is an original suit between two States, of which the Court has jurisdiction under Article III, Section 2, of the Constitution of the United States.

NATURE OF THE ACTION

This action concerns the boundary line between Michigan and Wisconsin in two areas; first, the water area be-

tween the center of Lake Michigan and the mouth of the Menominee River, and secondly, the area in the lower end of the Menominee River with particular reference to so-called Sugar and Grassy Islands.

HISTORY OF THE CASE

The Bill of Complaint was filed by plaintiff, the State of Wisconsin on November 7, 1932, and the Answer of the Defendant, the State of Michigan, was filed on December 27, 1932. On January 23, 1933, this Court appointed Frederick F. Faville, Esquire, of Des Moines, Iowa, as Special Master. The Special Master from time to time took testimony and received evidence in the cause, and heard arguments thereon on April 9th and 10th, 1934. His report and recommendations were filed in this Court on the 12th day of November, 1934.

HISTORY OF PREVIOUS LITIGATION

In 1923, the State of Michigan commenced an action against the State of Wisconsin for the establishment of the boundary between the States of Wisconsin and Michigan from the junction of the Montreal River with Lake Superior, across the so-called Upper Peninsula of Michigan, and that part of Wisconsin adjacent thereto, to Green Bay, and through Green Bay to the center of Lake Michigan. Three sections of the boundary were involved, denominated: (1) Montreal River Section, (2) Menominee River Section and (3) the Green Bay Section. This court rendered a decision in said cause on the 1st day of March, 1926, which opinion was delivered by Mr. Justice Sutherland.[1]

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[1]Michigan v. Wisconsin, 270 U. S. 295; 70 L. Ed. 595; 46 Sup. Ct. Rep.

On the 22nd day of November, 1926, the decree of said court was announced by Mr. Justice Sutherland for the purpose "of carrying the said opinion into effect."[2]

The present action does not involve any part of the said Montreal River Section, but involves a part of the Menominee River Section and all of the Green Bay Section.

CONTENTIONS OF THE PARTIES AS TO JURISDICTION OF THE COURT

The State of Wisconsin contends that said decree of November 22, 1926 is not res adjudicata of the issues in this case; first, because mutual mistakes were made in the description of the boundary line in said decree; secondly, because said decree was entered by consent, was erroneous and did not conform to the opinion of the court; and thirdly, because the precise location of the boundary line in the waters of Green Bay was not in issue and was not adjudicated in the said original case.

The State of Michigan contends that said decree of November 22, 1926 is res adjudicata of all of the issues in this case, except for the correction of transcriptional errors.

CONTENTIONS OF THE PARTIES AS TO THE LOCATION OF THE TRUE BOUNDARY

The State of Wisconsin contends that the true boundary line between the States of Wisconsin and Michigan in

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[2]Michigan v. Wisconsin, *272* U. S. 398; 71 L. Ed. 315.

the water area between the mouth of the Menominee River and the center of Lake Michigan is a line which follows the geographical center of Green Bay, through the geographical center of the Rock Island passage at the entrance to the bay and thence easterly to the center of Lake Michigan.

The State of Michigan contends, that the true boundary line between the States proceeds from the mouth of the Menominee River East by South 7½ miles (modified on hearings before the Master to 7⅛ miles) or at right angles to the modern charted shipping course which proceeds southerly to the City of Green Bay at the foot thereof, thence following said modern charted shipping course northerly to a sailing objective 2 miles west of Chamber's Island light, thence following a modern charted shipping course to a sailing objective off Boyer's Bluff, on Washington Island, and thence following the modern charted shipping course easterly through the Rock Island passage aforesaid to the center of Lake Michigan.

Each of the contending states laid claim to Sugar and Grassy Island in the lower end of the Menominee River.

THE FINDINGS AND CONCLUSIONS OF THE MASTER AS TO JURISDICTION OF THE COURT

The Special Master made numerous findings of fact and conclusions of law throughout his report.

As to the first question of the jurisdiction of the court, he found that mutual mistakes were made in the decree and that it is absolutely essential that the decree be opened up and the necessary corrections made, that it was entered by consent of the parties under the mistaken belief

that it complied with the opinion of the court, and that the issue now tendered as to the location of the boundary line, in the waters of Green Bay as distinguished from the islands therein was not adjudicated in the former case. The Master concluded that the complainant may now prosecute this action.

THE FINDINGS AND CONCLUSIONS OF THE MASTER AS TO THE LOCATION OF THE BOUNDARY

The Green Bay Section

Jurisdictional line

Both states claimed that the boundary line proposed by each as the true boundary, had been the accepted boundary for many years, and had been established in the location contended for by it, by reason of the exercise of dominion and jurisdiction over the area between the line contended for and the mainland of said state for long periods of time.

The Master made findings and conclusions against both states on this contention.[3]

Location of Line Under the Acts of Congress

The master found that the entire body of water of Green Bay is one wide channel, the whole of which was traversed by ships at the time the line was established by Congress as the center of the most usual ship channel, and that if, as a fact, there did exist in 1836 (the year of the

[3]Report of Special Master, pages 29 and 30.

Michigan Enabling Act which established the boundary) any such thing as the "most usual ship channel" in the body of Green Bay its true location cannot now be ascertained.[4] Both this Court in 1926 and the parties in this cause assumed the "most usual ship channel" to refer to a channel in the body of Green Bay. The master concluded that if this were the channel Congress referred to in the Act establishing said boundary, the geographical center of that portion of the bay involved would be the proper boundary.[5]

Location of Line Under Master's Construction of Congressional Acts

The Master did not accept the premise as correct that Congress by the words "most usual ship channel" referred to the channel within the Bay itself, as well as the entrance to the bay, and reached the conclusion that the "channel" referred to, within which Congress defined the boundary line, had reference only to the channel between the islands at the entrance to the Bay; that is, between the islands that separate the body of Green Bay and Lake Michigan, and that this channel was the Rock Island Passage.

Recommendations of the Master

The Recommendations of the Master for a decree defining the boundary were in the alternative. The first provided that if the Master's construction of the Congressional Acts fixing the boundary, were correct (that the channel involved was the one between the islands at the

[4]Report, page 34.
[5]Report, page 37.

entrance to the bay), that the line be drawn from a point in the middle of Lake Michigan opposite the center of the Rock Island Passage, thence in a general westerly direction through the center of said passage, and thence in a course capable of navigation by the most direct route to the mouth of the Menominee River.

The second provided that if this court holds, as both parties assume, that the terms "most usual ship channel" refer to a channel in the body of Green Bay proper, the line be then drawn in the geographical center of the portion of Green Bay lying west of Chambers Island north and eastward, to the point where said line intersects a line extended westward through the center of the Rock Island passage, thence along said last stated line to the center of Lake Michigan.

The Grassy and Sugar Island Area

The Master found that the technical description in the decree of November 22, 1926, as to Grassy Island and Sugar Island was erroneous, that the same were not islands in 1836 or at any other time, were subaqueous land, have been in uninterrupted possession of Michigan for a long period of years, and that Michigan has for many years exercised jurisdiction and dominion over these tracts without objection by Wisconsin.

The Master recommended that the area of land commonly called Grassy Island and Sugar Island be decreed to be a part of the mainland of Michigan and awarded to the State of Michigan.

volved in the former case, complainant is not barred from prosecuting this action.

These four exceptions go to the matter of jurisdiction of this court.

On The Merits

The State of Michigan further excepted:

(5) To the conclusion of the Master that neither state has shown such an open, long-continued, uninterrupted and peaceable possession of the disputed area and the exercise of sovereignty and dominion over it as to establish any definite line as the true boundary line in Green Bay;

(6) To the finding of the Master that there was no such thing as a charted sailing course or any well recognized or defined ship channel in the waters of Green Bay in 1836, and that if such did exist, its true location cannot now be ascertained;

(7) In toto to the conclusions of the Master as to the location of boundary line under Congressional Acts as interpreted by the parties;

(8) To the Master's conclusions as to the location of the boundary, under the Master's Construction of Congressional Acts; and

(9) To both alternative recommendations of the Master as to the location of the boundary line in the body of Green Bay from the mouth of the Menominee River to the center of Lake Michigan.

Questions for Determination

Under the exceptions of the parties, so taken, to the report of the Special Master, the questions for determination are as follows:

(1) Has this court jurisdiction of the action?

(2) Has the boundary line in the water area of Green Bay and extending to the center of Lake Michigan, been established by long continued exercise of dominion and jurisdiction over the disputed area by the State of Michigan? (Michigan alone excepted to the Master's findings and conclusions that it has not been so established).

(3) If it has not been so established, what is the proper judicial determination of its location under the Acts of Congress? and

(4) Confirmation of the Master's findings and conclusions with respect to so-called Sugar and Grassy Islands in the lower end of the Menominee River, to which neither party has excepted.

SUMMARY OF ARGUMENT

HISTORICAL BACKGROUND

One phase of this proceeding was tried in this court from 1923 to 1926 and resulted in a decision by this court on the 1st day of March, 1926.[6]

That was an action in which the State of Michigan, now defendant, was plaintiff, and the State of Wisconsin, now plaintiff, was defendant. It involved the boundary between the two states in three sections of their common boundary.

The Montreal River section, so-called, involved that portion of the boundary from the mouth of the Montreal River at Lake Superior to the headwaters thereof, and across the land area easterly to Lac Vieux Desert. No portion of this boundary is in issue in this case.

The Menominee River section continued from Lac Vieux Desert across the land area to Lake Brule, down the Brule River and the Menominee River to the mouth of the Menominee into Green Bay. By the pleadings, Sugar and Grassy Islands, lying near the mouth of the Menominee River, were put in issue in this case.

The third section, denominated the Green Bay section, involved the boundary from the mouth of the Menominee River through the water area of Green Bay to the center of Lake Michigan. The boundary through this area is in issue in this case.

Legislation Establishing the Boundary

The boundary between Wisconsin and Michigan was established by the Michigan Enabling Act on the 15th day

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[6]Michigan v. Wisconsin, 270 U. S. 295.

of June, 1836. It provided that the boundary shall proceed down the centre of the main channel of the Menominee River,

> "* * * * to the centre of the most usual ship channel of the Green Bay of Lake Michigan; thence through the centre of the most usual ship channel of the said Bay to the middle of Lake Michigan.'"[7]

Less than two months prior thereto, the territory of Wisconsin was set off by an act of Congress approved April 20, 1836, which described the line in the reverse order as follows:

> "* * * to a point in the middle of said lake (Lake Michigan) and opposite the main channel of Green Bay and through said channel and Green Bay to the mouth of the Menominee River.'"[8]

The State of Wisconsin was created with the boundaries prescribed in her Enabling Act of August 6, 1846, approximately ten years later, and in the Green Bay area provides for the same line as that in the Michigan Enabling Act.[9]

Between the dates of the enactment of the Michigan Enabling Act and the Wisconsin Territorial Act in 1836 and the enactment of the Wisconsin Enabling Act in 1846, pursuant to the direction of Congress, the War Department sent one Thomas Jefferson Cram with an expedition to establish the route of the boundary. In his first report following his first expedition, Cram stated that confusion arose because geographical features along the route of the boundary did not correspond with the description in the Michigan Enabling Act. Among other things, he recom-

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[7]Chapter 99, 5 U. S. Stat. at L. 49.
[8]Chapter 54, 5 U. S. Stat. at L. 10-11.
[9]9 U. S. Stat. at L. 7.

mended a division of islands in the Menominee River with Quinnesec Falls as the dividing point, those above said falls to be decreed to Michigan and those below to Wisconsin. He also reported on the difficulty of determining the most usual ship channel in the Green Bay area and illustrated the various ship channels therein on a map attached to said report.[10]

When the Wisconsin Enabling Act was passed some six years later the division of islands proposed by Cram in said report was adopted, and although the same was not ratified by the State of Michigan, it was sustained by this court in its 1926 opinion as a general readjustment of the boundary.[11]

Michigan v. Wisconsin, 1923-26

The action commenced in 1923 placed practically the entire boundary between the states in dispute. The State of Michigan asked for affirmative relief against the State of Wisconsin, alleging that Wisconsin had unlawfully possessed itself of certain islands in Green Bay within the Michigan grant, as well as other allegations for relief along the remainder of the boundary.[12] The State of Michigan prayed for the establishment of a boundary in the Green Bay section which proceeded easterly across Green Bay to a point near the coast of the Door County peninsula of Wisconsin, thence through the Strawberry passage and thence northerly and easterly through the Porte des Morts passage into Lake Michigan. The complaint in this area

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[10]Wisconsin Exhibit 38, Record p. 99-118.
See Plaintiff's Brief, page 32, 33.
[11]Michigan v. Wisconsin, 270 U. S. 295, 310.
[12]See Plaintiff's Brief, page 73-75.

concerned itself entirely with the possession of islands in Green Bay.[13]

The answer of the defendant, Wisconsin, denied such allegations and alleged that the most usual ship channel did not follow said passage but was westerly of the islands involved, and prayed that the action be dismissed.[14]

On March 1, 1926, this court rendered its decision and sustained the division of islands in the Menominee River as a readjustment of the boundary, as has already been set forth. This court determined that by reason of the long exercise of jurisdiction over the islands involved, Michigan had failed to maintain her case, and that the claims of Wisconsin as to the location of the boundary be sustained.[15] The decision provided that the parties might submit a form decree within thirty days, failing which, a decree dismissing the bill would be entered.

Subsequently, the parties met by their respective counsel in Washington and discussed the formation of the decree. They were advised by Mr. Justice Sutherland that the court intended to establish a boundary in the identical position where the states had exercised jurisdiction theretofore.[16] Michigan counsel lived at the scene of the Green Bay area; Wisconsin counsel was not familiar with the area or nautical terms used by navigators in traversing the same. They were advised by Mr. Justice Sutherland that notwithstanding the court's opinion as to the division of islands below Quinnesec Falls, the court intended to give Sugar Island to Michigan.[17] Counsel for Michigan dictated that portion of the decree which established a boundary

[13]See Plaintiff's Brief, page 74.
[14]See Plaintiff's Brief, page 76.
[15]See Plaintiff's Brief, page 34-39.
[16]See Plaintiff's Brief, page 53-55.
[17]See Plaintiff's Brief, page 53-55.

through the Green Bay waters, and counsel for Wisconsin consented thereto, believing that said line followed a jurisdictional line which the court had instructed them to follow as outlined by counsel for Michigan.[18] The Special Master, in this case, found that no line had been established in the Green Bay area by the exercise of dominion by either state.[19]

Notwithstanding that Michigan counsel dictated the decree on their own terms, on their own theory of the proper location of the line, they committed the following errors:

(1) The first course from the mouth of the Menominee River to the modern charted shipping course, was described as 7½ miles, when, in fact, it is 7⅛ miles. This is conceded by Michigan.

(2) The first course was intended by Michigan to be perpendicular to the second course. It is not so drawn and there is no evidence in the record to show what course is perpendicular.[20]

(3) The third course of the boundary is described, "* * * * thence continuing along said ship channel north by east ⅞ east, 27 miles;" (The inclusion of the word "by" causes this course to proceed northerly, and results in the succeeding course passing over the mainland of Michigan.)

(4) The attempted description of Sugar Island as a part of lots 1 and 2, section 11, lot 6 of section 2 and lot 1 of section 3, township 31, north of range 27, west, of

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[18]See Plaintiff's Brief, page 55.
[19]Master's Report. page 29.
[20]Testimony Col. Lawrence Martin, Record p. 93.

the Michigan public survey, was erroneous, because Sugar Island was never included in the survey, although the sketch of the survey shows two small islands in the position of Sugar Island.

When this situation was discovered in 1929, the parties attempted to reconcile their differences, but without success,[21] and this original action resulted therefrom.

THE JURISDICTION OF THE COURT

Plaintiff's Contention

The plaintiff contends that the court has jurisdiction by virtue of the provisions of the Constitution of the United States[22] and that the decree in *Michigan v. Wisconsin*[23] is not res adjudicata for the reason,

First, that the decree aforesaid was the result of mutual mistakes inadvertently made.

Secondly, that the decree was entered by consent of the parties under the mistaken belief that it complied with the opinion of the court, and was erroneous.

Third, that the issue before this court of the precise location of the boundary through the most usual ship channel of Green Bay or the "centre" thereof was not involved in the former action.

Mutual Mistakes

The State of Michigan under its theory of the location of the boundary admitted in its answer that there were at least two errors in the decree,

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[21]See Plaintiff's Brief, page 43-44.
[22]Art. III, Sec. 2.
[23]272 U. S. 398.

(1) The description of Sugar Island, and

(2) The description of the third course of the boundary in Green Bay after leaving the mouth of the Menominee River.

Upon the hearings before the Master it developed that the length of the line proposed by Michigan as the first course in the Green Bay area from the mouth of the Menominee River and described in the decree as seven and one-half miles was actually seven and one-eighth miles in length. This variance is admitted by all the parties.[24]

It further developed that the said line attempting to describe the first course in the boundary in Green Bay from the mouth of the Menominee River, and which Michigan had intended to be the shortest line to the modern charted shipping course to which it proceeds, is not in fact the shortest course because it is not perpendicular to said charted shipping course.[25]

These are errors under Michigan's theory of where the boundary should be placed. In addition, in the draft of the decree, counsel were instructed to draw the boundary along the jurisdictional line.[26] This was not done because user had not determined the line.[27]

The first course of the boundary described in the decree emerging from the mouth of the Menominee River not only did not conform to the boundary contention of either party,[28] but did not conform to the opinion of the

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[24]Master's Report, page 24.
[25]See Plaintiff's Brief, page 50.
[26]Testimony Robert M. Rieser, Record p. 12.
[27]Master's Report, p. 30.
[28]See Plaintiff's Exhibits 1 and 17 Record, p. 96, 97.

court delivered on March 1, 1926, in that it pursued a course southerly and easterly instead of northerly from the mouth of the Menominee River.[29]

The remaining courses of the boundary in the waters of Green Bay followed modern shipping courses which were not established for many years after the creation of the boundary.[30]

In addition to the error admitted by Michigan in attempting to describe Sugar Island as surveyed land when in fact it was unsurveyed land, plaintiff contended before the Master that Grassy Island lying upstream from Sugar Island was Wisconsin territory under the general provisions of the Wisconsin Enabling Act, that all islands below Quinnesec Falls belonged to Wisconsin. In order for the decree to be correct, Grassy Island was either subaqueous land or mainland in 1836 and the entire area belonged to Michigan by virtue of the Enabling Act, or it was insular and went to Wisconsin under the division of the islands. It had been included in the Michigan survey and the legal description of lands awarded to Michigan in 1926 described the eastern half of Grassy Island, raising the inference that the western half was Wisconsin. Obviously, this was erroneous as the entire island must be treated as a whole and awarded to one state or the other.

With this mass of errors in the decree the Special Master concluded that mutual mistakes were made and that it is absolutely essential that the decree be opened up and the necessary corrections made to carry out the

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[29]Michigan v. Wisconsin 270 U. S. 295.

[30]Testimony Col. Lawrence Martin Record, p. 66.

purpose and intent of the court as expressed in the opinion.[31]

We contend that no exceptions having been taken to this portion of the report and to the Master's findings and conclusions with respect to mutual mistakes, this court has jurisdiction, regardless of defendant's exceptions to other matters in the Master's Report relating to jurisdiction.[32]

Former Decree a Consent Decree

We contend that the decree entered in 1926 was not the deliberate conclusion of the court but was entered by consent of counsel. We contend that counsel had no authority to so consent and could aid in describing the route of the boundary in accordance with the opinion of the court, only, where the line was established by user and there was no controversy with respect thereto. The boundary in the Green Bay area had not been established by user and the authority delegated to counsel to assist in drawing the decree was limited to the area where the line was definitely established by user.[33]

The said consent decree containing the many errors heretofore described not complying with the opinion of the court, and the court having adopted the same because of such consent of counsel, it is not res adjudicata.[34]

Lawrence Mfg. Co. v. Janesville Mills, 138 U. S. 552;
Gay v. Parport, 106 U. S. 679;

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[31]Master's Report, page 24.
[32]See Plaintiff's Brief, page 48-51.
[33]Testimony Robert M. Rieser, Record p. 12.
[34]See Plaintiff's Brief, page 53-61.

Utah Power & Light Co. v. U. S., 42 Fed. 2nd, 304, 308.

The Master found in accordance with plaintiff's contentions in this regard and concluded that the decree may properly be corrected in this action.[35] Defendant, excepted to such findings and conclusions.

The Issue of the Location of the Line in Green Bay

Plaintiff contends that the issue of the actual location of the line in the waters of Green Bay has never been litigated, and in support thereof sets forth parts of Michigan's Bill of Complaint in 1923,[36] Wisconsin's Answer in 1923,[37] the testimony in 1923,[38] the opinion of the court in 1923-26,[39] the pleadings in this action,[40] and the evidence in this case as to what the issues were in 1923.[41]

In the former action the State of Wisconsin did not ask for any affirmative relief against Michigan,[42] and the boundary proposal of the State of Michigan lay within a ship channel entirely foreign to the one in which the court found the true boundary to lie.

The law is plain that the recitals in the decree beyond the matters in issue are not res adjudicata,[43] and in the determination of what the issues were the court may examine the record including the pleadings, the evidence,

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[35]Master's Report, page 25.
[36]See Plaintiff's Brief, page 73-75.
[37]See Plaintiff's Brief, page 75-77.
[38]See Plaintiff's Brief, page 78.
[39]See Plaintiff's Brief, page 78, 79.
[40]See Plaintiff's Brief, page 79-81.
[41]See Plaintiff's Brief, page 82-84.
[42]Answer to Bill of Complaint, par. 5, page 5.
[43]See Plaintiff's Brief, page 64-73.

the contentions of the parties, the findings and the opinion of the court.[44]

The Special Master found that the issue now tendered as to true location of the boundary line, in the waters of Green Bay as distinguished from the islands therein, was not directly involved in the former action, and concluded that the complainant is entitled to have the true location of the boundary in Green Bay now determined.[45] The defendant excepted to such findings and conclusions.

Having found favorably on all three of the contentions of the plaintiff, the Master held that the former decree was not res adjudicata, and the boundary should now be determined on the merits of the case.

THE LOCATION OF THE BOUNDARY BY DOMINION AND ACQUIESCENCE

Both states contended before the Master that they had established their right to the disputed area of the waters in Green Bay by possession and dominion and the acquiescence of the other state thereto. The Master found against both states on this contention.[46] The defendant alone excepted to such findings and conclusions based thereon. It should not be necessary in this summary to set out the evidence on this phase of the matter in detail, although it does comprise perhaps the greater part of the record in this case.

The only occasion for the exercise of jurisdiction by either state in the disputed area, arises from the fact

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[44]Oklahoma v. Texas, 256 U. S. 602.
[45]Master's Report, pages 25 and 26.
[46]Master's Report, pages 27, 28 and 29.

that both states require residents of other states fishing within its water to secure non-resident fishing licenses. This requirement first went into effect in 1907. Prior to 1907 it was of little interest to either state to what point its sovereignty in the waters of Green Bay extended. Accordingly, the evidence in this respect consisted of maps, official and nonofficial, and the testimony of sailors and fishermen familiar with the waters of the Bay with respect to the reputed boundary therein, and the source of their information.

All of the official maps in the record portraying a boundary in this area disclosed a boundary strikingly similar to that contended for by the plaintiff, Wisconsin, and entirely dissimilar from the line contended for by the defendant, Michigan.[47] This applies also to maps published in the official directory of Michigan.[48]

Suffice it to say that in the Menominee River and Chambers Island area, in this mass of testimony, there is only one proponent of the Michigan boundary proposal, a Michigan warden—and even he concedes that this results from his own construction of the Michigan Enabling Act and not by virtue of any general reputation as to the boundary.[49]

The only evidence in support of defendant's contention that the Master erred is the fact that annually, for a period of several days, a boat of the Michigan Conservation Department traveled along the Michigan boundary proposal north of Chambers Island only, but made no arrests of Wisconsin fishermen in the disputed area.[50]

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[47]See Plaintiff's Brief, page 86-90.
[48]See Plaintiff's Brief, page 86, 87.
[49]Testimony Captain Ellsworth, Record p. 22.
[50]See Plaintiff's Brief, page 92-94.

While the plaintiff did not except to the Master's findings and the defendant did, we submit that the record discloses a much greater basis for the establishment of the Wisconsin boundary proposal by user, than it does the Michigan boundary proposal.

THE TRUE LOCATION OF THE BOUNDARY

Parties' Construction of Congressional Acts

Throughout the proceedings the parties contended that when Congress referred to the "main channel" in the Wisconsin Territorial Act and the "most usual ship channel" in the Michigan Enabling Act, it referred to a channel in the body as well as at the entrance to Green Bay. It was the plaintiff's contention that the word channel does not refer to a line but to an open body of water and that the center thereof is the geographical center. The defendant contended that the most usual ship channel meant a line of shipping.

The Master found that there was no most usual ship channel, that the entire area was one wide channel and was traversed in all directions in 1836. He concluded, therefore, that the boundary was as the plaintiff contended, in the geographical center of the bay. This conclusion of the Master was based, however, upon the assumption that Congress referred to a channel in the body of the Bay.

The defendant Michigan excepted to the whole thereof and the plaintiff Wisconsin to the inference which may be drawn from the Master's findings that there was no main channel in Green Bay in 1836, that the Master meant

thereby that the entire body of the bay constituting the one wide channel was not the channel referred to by Congress.

The record discloses that what evidence of shipping exists, shows no precise course for vessels in 1836, and that vessels were small, mostly sail and were obliged to travel in various directions depending upon the wind. The record shows that this type of navigation continued for some years after 1836,[51] and that it was not until the chart of 1863-1864 made its appearance, almost thirty years after the Enabling Act establishing the boundary, that definite courses of shipping for vessels to follow were established on Green Bay.[52]

Plaintiff contends that of necessity Congress could not have referred to a course of shipping established almost thirty years later, which does not now correspond with the modern shipping course (the Michigan boundary proposal), and must of necessity have referred to the body of water lying between the straits as a channel, and to the geographical center thereof as the center.

This construction of the word channel is supported by the report of Captain Thomas Jefferson Cram who visited the area in 1840.[53]

It is further supported by more modern navigation publications and by expert geographical testimony.[54] The plaintiff called Col. Lawrence Martin, Chief of Division of Maps, Library of Congress, who testified that in his

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[51]See Plaintiff's Brief, page 102.
[52]See Plaintiff's Brief, page 102-103.
[53]See Plaintiff's Brief, page 104-105.
[54]See Plaintiff's Brief, page 105-107.

opinion Congress could only have referred to the entire body of water in describing the channel and that this construction was supported by other evidence in the case hereinbefore referred to.[56]

This construction of the definition of channel is further supported by its use in the establishment of other boundaries, notably the boundary between Wisconsin and Minnesota.[57]

It is also supported by the definition of channel used in the Wisconsin Enabling Act in describing the line through Lake of the Desert.[58] All of the charts in evidence, whether of ancient or modern origin, of the Green Bay area, show depths of water sufficient for navigation almost anywhere in Green Bay outside of the shoal areas near the shore line.[59]

The vessels of that period were of light draught. The Frigate Constitution, one of the largest ocean going vessels of the period of the War of 1812, had a draught of only 22 feet 6 inches.[61]

The evidence shows that there is no thalweg or filum aquae in Green Bay nor any necessary track of navigation therein.[62] Accordingly, the true rule of law that will give equality of beneficial use in this area is the geographical center rule.[63]

All of the authorities agree that in areas of this kind the proper boundary is the geographical center thereof.[64]

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[56]See Plaintiff's Brief, page 105, 106.
[57]See Plaintiff's Brief, page 106, 107.
[58]See Plaintiff's Brief, page 107, 108.
[59]See Plaintiff's Brief, page 108.
[61]Ency. Britanica, Vol. 6, page 313.
[62]See Plaintiff's Brief, page 117-118.
[63]Minnesota v. Wisconsin, 252 U. S. 273.
[64]See Plaintiff's Brief, page 111-117.

The authorities also agree that in drawing such a geographical center line the sides of the channel are treated as a straight line across indentations under the rule of fauces terrae.[65]

Master's Construction of Congressional Acts

The Master declined to accept the construction that the "main" or "most usual ship" channel defined in the acts of Congress hereinbefore described, referred to a channel in the body of Green Bay as well as at the entrance thereto and concluded that it referred only to the channel at the entrance thereto.

In support of his construction he relied upon the Wisconsin Territorial Act[66] which described the line from a point opposite the main channel of Green Bay, "thence through said channel *and* Green Bay to the mouth of the Menominee River." The word "and," the Master concluded, would become meaningless unless the construction were adopted that the channel referred to was in the entrance only.[67]

The Master also concluded that this construction could be reconciled with the Michigan Enabling Act and was supported by letters from Lucius Lyon, a former delegate from the Territory of Michigan and Senator-elect from the prospective state,[68] and the Master therefore recommended that the boundary shall proceed from a point in the center of Lake Michigan opposite the main channel of Green Bay, thence through said channel at the entrance to

[65]See Plaintiff's Brief, page 118-122.
[66]5 Stat. at L. 10, 11.
[67]Master's Report, pages 38 to 42 inclusive.
[68]Master's Report, pages 43 and 44.

Green Bay and thence by the most direct and navigable route to the mouth of the Menominee River. Both parties excepted to the Master's findings, conclusions and recommendations in this respect.

Plaintiff's Contentions of Error

The plaintiff contends that the Master erred in this construction for the reason that the Michigan Enabling Act is the effective act,[69] that the report of Captain Cram made four years after the creation of the boundary construes the word channel in the Congressional Act as referring to a channel in the body of the bay, as well as in the entrance thereto,[70] and for the reason that succeeding Cram's report legislation was attempted in the Congress of the United States to clarify the Congressional Acts.

Upon the report of Cram disclosing that the geographical features did not agree with the boundaries described in the Michigan Enabling Act, three separate bills were introduced in Congress between 1842 and 1844. Cram had reported and described that a ship channel existed east of Chambers Island and one westerly thereof.[71] The legislation attempted, following said report twice passed the Senate, and failed passage in the House by reason of adjournment only. It proposed to amend the Michigan Enabling Act by definitely defining the channel westerly of Chambers Island.[72] This construction of the Congressional Acts by Cram and by Congress within

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[69]See Plaintiff's Brief, page 129.
[70]See Plaintiff's Brief, page 130.
[71]Plaintiff's Exhibit 38, Record, p. 115.
[72]Record, p. 118-122.

a period of eight years from the establishment of the boundary, when undoubtedly Congress still contained some members who were there when the Michigan Enabling Act was adopted, shows, we submit, that the Master erred in his construction of what channel Congress referred to. The significance of this legislation is that it was proposed by members of Congress from the state of Michigan.

The Master Erred in Not Applying the Proper Rule of Law in Describing the Boundary in Green Bay.

Assuming however, that the Master's construction of which channel was referred to in the Congressional Acts, is correct, namely that Congress referred to the channel at the entrance to the Bay, there is no rule of law which permits the most direct and navigable line to be followed after one has proceeded through said channel. Plaintiff contends that the geographical center rule is the only proper rule of law and is the only rule of law applicable to the situation.[73]

It therefore, under plaintiff's contentions, makes no difference whether Congress intended to refer to a channel at the entrance to the bay or a channel in the body of the bay and the entrance thereto.

In either case, the only rule of law applicable is the geographical center rule.

The Michigan boundary proposal has no basis in law or fact. The record shows as we have stated, that no course was customarily traveled by ships and there were no directions for sailing a precise course on Green Bay

[73]See Plaintiff's Brief, page 135-138.

until almost thirty years after the Michigan Enabling Act.

The boundary proposal of Michigan follows a modern shipping course and not the shipping course established almost thirty years after the boundary was created. The only rule in support of this construction cited by Michigan is that this shipping course (the modern shipping course) is the best evidence today of the location of the "center of the most usual ship channel" in 1836. No rule of law or authorities are cited in support of this proposition.

In the absence of a precise description of the boundary in water areas only two rules are applicable in interpreting locations described in the middle or center, of main or most usual channels. These two rules are the thalweg rule and the geographical center rule herein-before referred to. The thalweg rule is clearly not applicable[74] and plaintiff submits that the geographical center rule is the rule of law that must be applied in this situation; that the same must be applied regardless of whether Congress described a channel in the body of Green Bay or failed to describe the line in the body of Green Bay at all.

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[74]See Plaintiff's Brief, page 109-111.

DETAILED ARGUMENT

HISTORICAL BACKGROUND

As appears from the pleadings in this case, the report of the Special Master and the exceptions taken thereto this is an action involving the establishment of boundaries between Wisconsin and Michigan in the lower end of the Menominee River with reference to Sugar and Grassy Islands located in said area, and the water area of Green Bay from the mouth of the Menominee River flowing into the same, through the entrance of the bay into Lake Michigan and to the center of Lake Michigan.

WISCONSIN TERRITORIAL ACT

The territory of Wisconsin was set off in the identical year of the Michigan Enabling Act and shortly prior thereto by an act of Congress approved April 20, 1836,[1] and the boundary limits of said territory adjacent to that of the State of Michigan created shortly thereafter, were therein described as follows:

> "* * * to a point in the middle of said lake (Lake Michigan) and opposite the *main channel** of Green Bay and through said channel and Green Bay to the mouth of the Menominee River; thence through the middle of the main channel of said river, etc."

MICHIGAN ENABLING ACT

By the Enabling Act of June 15, 1836,[2] under which Michigan became a state on January 26, 1837,[3] this boun-

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[1]Chap. 54, 5 Stat. at L. 10, 11.
*Italics Ours.
[2]Chap. 99, 5 Stat. at L., 49.
[3]Chap. 6, 5 Stat. at L., 144.

dary was stated in the reverse direction from the description in the Wisconsin Territorial Act as follows:

> "* * * thence down the centre of the main channel of the same (Menominee River) to the centre of the *most usual ship channel** of the Green Bay of Lake Michigan; thence through the centre *of the most usual ship channel** of the said bay to the middle of Lake Michigan."

It will be noted that the Michigan Enabling Act and Wisconsin Territorial Act were enacted by the same Congress less than two months apart. Both the Senate and House had before them measures providing for the admission of the State of Michigan while the Wisconsin Territorial Act was pending. The question was before the House in the form of a resolution, House Resolution No. 382. It never became a law for the reason that the contemporaneous Senate bill served the same purpose and was passed. The House Resolution is material because of the description of the boundary which it contained, namely, "through the middle of the same (main channel of the said Menominee River) to the *middle** of Green Bay thence through the *middle of the main channel** of Green Bay to the middle of Lake Michigan * * *."[4]

The Senate Bill which finally became the Michigan Enabling Act was introduced on March 22, 1836, as Bill S-177.

CAPTAIN CRAM'S REPORTS

In 1840 and 1841, Captain Thomas Jefferson Cram, after the establishment of the boundary in the manner

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*Italics Ours.

[4]House Report 380, 24th Congress, 1st Session, page 16.

aforesaid, and pursuant to the direction of Congress that said boundary be correctly established and that the War Department conduct such survey, made two expeditions to Green Bay and up the Menominee River for the purpose of ascertaining the boundary. His first expedition was made in the summer of 1840, approximately four years after the passage of the Congressional Acts aforesaid.

In this expedition he concerned himself principally with the boundary in the vicinity of Lac Vieux Desert, between the head waters of the Montreal and Menominee Rivers, which territory is not now in issue.

Captain Cram reported as to the Green Bay area, that it is a well known fact to all who have any personal knowledge of the navigation of this bay, that there are at least two ship channels in use by all kinds of craft, and that it would be extremely difficult to decide the question, which of them is the "most usual ship channel." He attached to his report a number of maps and on Map No. 4 depicted the Green Bay area, and a designation of the two ship channels referred to.[5]

WISCONSIN ENABLING ACT

Subsequent to Captain Cram's report and on May 29, 1849, Congress admitted the State of Wisconsin into the union,[6] with the boundary provided for in the Enabling Act of August 6, 1846.[7] In the Green Bay area the Wisconsin Enabling Act prescribes as the boundary, the boundary line of the State of Michigan, but significantly adopts a suggestion of division of islands embodied in

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[5]Wisconsin Exhibit 38, Record p. 99.
[6]9 U. S. Stat. at L., 233.
[7]9 U. S. Stat. at L., 7.

Captain Cram's report, which this court later sustained as a general readjustment of the boundary.[8] These islands are not now in issue in this cause and reference is made for the purpose of calling attention to the importance to be given to the report of Captain Cram.

MICHIGAN v. WISCONSIN—1923-1926—Opinion

In 1923 the State of Michigan commenced action in this court for the establishment of the boundary between the State of Michigan and the State of Wisconsin from the junction of the Montreal River with Lake Superior across the so-called upper peninsula of Michigan through Green Bay and Lake Michigan. In that case arguments of counsel and the opinion of the court divided the area for the purposes of convenient discussion into three distinct sections denominated (1) Montreal River section, (2) Menominee River section, and (3) Green Bay section.

The pleadings in this cause raise no issue with respect to the "Montreal river section" and upon the failure of either state to except to the report of the Special Master in this case there is now no issue as to the "Menominee River section" beyond the confirmation of the Special Master's report with respect thereto.

The opinion of this court in said action was delivered March 1, 1926.[9] With respect to the Green Bay section, this court said:

> "In determining the boundary through this section, the question is not embarrassed by differences of description. The calls of the Michigan Enabling Act are down the channel of the Menominee to 'the center

[8] *Mich. v. Wis.* 270 U. S. 295 at 310, 46 Sup. Ct. Rep. 290 at 295.
[9] 270 U. S. 295; 70 Law. Ed. 595; 46 Sup. Ct. Rep. 290.

of the most usual ship channel of the Green Bay of Lake Michigan; thence through the center of the most usual ship channel of the said bay to the middle of Lake Michigan.' The Wisconsin Enabling Act calls for the same boundary.

"The evidence shows that there are two distinct ship channels, to either of which this description might apply. From the mouth of the Menominee, the channel, according to the Michigan claim, proceeds across the waters of Green Bay in an easterly direction until near the westerly shore of the Door county peninsula; thence, in close proximity to the shore, in a northerly direction to a point opposite Death's Door channel (or Porte des Morts); thence through that channel into Lake Michigan. *The channel claimed by Wisconsin, after leaving the mouth of the Menominee, turns to the north and pursues a northerly direction** to a point opposite the Rock Island passage which lies between Rock Island and St. Martin's Island; thence through the Rock Island passage into Lake Michigan. The territory in dispute lies between these rival channels and embraces two groups of islands; (1) Chambers Island, the Strawberry Islands, and a few others, small and unnamed, all within the main waters of Green Bay west of the Door county peninsula; and (2) Rock, Washington, Detroit and Plum Islands, lying between Death's Door channel and the Rock Island passage, at the north end of the peninsula. The evidence as to which of the two ship channels was the usual one at the time of the adoption of the Michigan Enabling Act is not only conflicting, but of such inconclusive character that, standing alone, we could base no decree upon it with any feeling of certainty. Living witnesses are no longer available; and tradition, recollection of statements made by persons long since dead—if of any legitimate value,—deduc-

*Italics Ours.

tions drawn from ancient documents, more or less cryptic, and inferences based on more recent uses of the channels or on their relative safety and convenience as indicated by physical characteristics, all relied upon in the absence of first-hand evidence constitute at best most unsatisfactory substitutes. If it were necessary, we should, of course, undertake the task—as we should be bound to do—of reaching a conclusion from these dubious premises. But it is not necessary, for, as in the case of the two sections of the boundary just discussed, the title of Wisconsin to the disputed area now in question is established by long possession and acquiescence; and this conclusion is justified by evidence and concessions of the most substantial character.

"There is evidence of acts of dominion and possession of some of the disputed islands while Wisconsin was yet a territory. Almost from the day of her admission, the state has continuously possessed, asserted title and exercised jurisdiction and dominion over all of the islands within the boundary claimed by her. In support of this general statement, the following, among other things, may be cited: On March 21, 1855, Washington, Detroit, Rock and Plum Islands described as being in the waters of Green Bay in Door county were organized by an act of the Wisconsin legislature as the town of Washington, Wis. Laws 1855, chap. 210. A census taken the same year by the town clerk showed a population of 318, which has since grown, it is said, to about 1,000. Since before that time, the United States Land Department, by its surveys, plats, and sales of public lands, has uniformly and notoriously recognized the islands as a part of Wisconsin, without objection on the part of Michigan. Indeed, as early as 1837, they were surveyed and platted as a part of Wisconsin territory. A large number of maps published and available to the public during

the years between 1837 and 1878, without exception, show the islands as a part of Wisconsin; and during the same time they do not appear in any survey or upon any map as belonging to Michigan. Never, so far as we are able to find from the record, have they been recognized in any practical way as a part of Michigan or, prior to the commencement of this suit, claimed by that state.

"The evidence in respect to the other group of islands, while perhaps not so complete, is definite and clear to the same effect. The taxation of lands on Chambers Island began while Wisconsin was still a territory. In 1861, voters on that island participated in a Wisconsin election. A history of Door County, introduced by complainant, recites that the island constituted an organized town forming a part of Door County, Wisconsin, as early as 1867. Evidence of early and continued recognition and treatment of the island as part of Wisconsin by the United States through its surveys, etc., is to the same effect as that in respect of the other group. And the evidence is likewise the same in respect of the uniform appearance of Chambers Island and the other small islands of the group upon the old maps as a part of Wisconsin, and their absence from Michigan surveys and maps. The absence of evidence of specific acts of dominion over the Strawberry and the other small islands of this group is easily understood and does not affect the result. They are of little consequence, lying well within the boundary as claimed by Wisconsin, easterly from Chambers Island and near the westerly shore of the Door County peninsula. They appear on all maps as, and have never been regarded or treated otherwise than, a part of Door County. It is impossible to give them a status differing from that of the larger island and the peninsula, between and within the shadows of which they lie.

"That Wisconsin since statehood has continuously asserted title and has exercised complete and exclusive dominion over all the islands of both groups is really not a serious issue. Indeed, the bill of complaint avers that Wisconsin had possessed herself of, and exercised sovereignty over, the islands, including Washington, Plum, the Strawberries, and numerous other valuable islands, and has excluded and continues to exclude the state of Michigan from her rights thereto; and, more particularly, that 'Wisconsin has for many years disregarded the true and rightful boundary * * * and has for a long time past possessed and does now possess, and has asserted and does now assert, civil, criminal, and political jurisdiction over those portions of the territory within the Michigan boundaries above described as the Montreal river section, the Menominee river section, and Green Bay sections of the disputed territory, aggregating approximately 255,000 acres, * * * and has unlawfully taxed and still continues to unlawfully tax said property, * * *.' The explanation relied upon is that the state of Michigan, as a result of her excusable ignorance, has not been aware of the real facts and, therefore, should not be held to have lost rights by long acquiescence which she otherwise might have had. This view cannot be accepted and may be dismissed with a reference to what we have already said as to the same defense in respect to the Montreal river section.

"* * * * *The result is that complainant has failed to maintain her case in any particular; and that the claims of Wisconsin as to the location of the boundary in each of the three sections are sustained.*[*]

"The decree, therefore, will be for Wisconsin, costs to be divided between the parties in accordance with the general rule in cases of this character. *North*

[*]Italics Ours.

Dakota v. Minnesota, 263 U. S. 583. The boundary seems to be sufficiently defined for all purposes of future possession and jurisdiction; but the parties, or either of them, if so advised, may within thirty days submit the form of a decree more particularly to carry this opinion into effect; failing which, a simple decree dismissing the bill will be entered.

"It is so ordered."

MICHIGAN v. WISCONSIN—1923-1926—DECREE

Subsequently and on the 22nd day of November, 1926, the decree of this court was announced by Mr. Justice Sutherland for the purpose "of carrying the said opinion into effect,"[18] and reads as follows:

"Decree announced by Mr. Justice Sutherland:

"This cause having been heard and submitted upon certain questions, and the court having considered the same and announced its conclusions in an opinion delivered March 1, 1926 (270 U. S. 295, 46 S. Ct. 290, 70 L. ed. 595):

"Now, for the purpose of carrying the said opinion into effect, it is ordered, adjudged, and decreed:

"1. That the boundary between the states of Michigan and Wisconsin along the following course be and it is hereby fixed and finally established as follows:

"From Lake Superior through the middle of the main channel of the Montreal river, to the headwaters thereof, as established in the survey of Captain Cram at the junction of the Pine river and Balsam creek (also known as Lehman's creek); thence along the

[18]Michigan v. Wisconsin, 272 U. S. 398, 71 L. Ed. 316.

line of the survey of William A. Burt of 1847, to the center of the channel between Middle and South Islands in the Lake of the Desert; thence continuing along the line of said survey to the shore of Lake Brule; thence along the southerly shore of Lake Brule to the center of the main channel of the River Brule; thence down the center of the main channel of the rivers Brule and Menominee to the center of the harbor entrance of said Menominee river; thence in a direct line to the most usual ship channel of Green Bay, passing to the north of Green Island and westerly of Chambers Island and through the Rock Island Passage into Lake Michigan, by courses and distances as follows: From a point midway between the outer ends of the Menominee river piers; thence east by south, seven and one-half miles to the center of the most usual ship channel of the Green Bay; thence along said ship channel north by east one-eighth east, eight and seven-eighths miles; thence continuing along said ship channel north by east seven-eighths east, twenty-seven miles; thence continuing along said ship channel, east one-fourth north, ten and one-fourth miles; thence east three-fourths north to the boundary between the state of Michigan and the state of Wisconsin in the middle of Lake Michigan: Provided, that the section of the boundary in the Brule and Menominee rivers shall follow the main channel thereof, except that where islands occur in the Brule river or in the Menominee river, down to and inclusive of the Quinnesec Falls, extending to the line between sections 5 and 6, township 38 north, of range 20 east, of the Wisconsin public survey, extended across said river, the line shall pass through the channel nearest the Wisconsin bank, so as to throw all such islands into Michigan; and where islands occur in the Menominee river below the Quinnesec Falls, the line shall pass through the channel nearest the Michigan bank, so as

to throw all such islands into Wisconsin: Provided further, that the land known as "Merryman's Island," being surveyed as part of sections 20 and 29, township 36 north, of range 28 west, of the Michigan public survey, and the land known as "Sugar Island," being a part of lots 1 and 2, section 11, lot 6 of section 2, and lot 1 of section 3, township 31 north, of range 27 west, of the Michigan public survey, is determined to be part of the mainland of Michigan."

THE PLEADINGS OF THE PARTIES IN THIS CAUSE

Wisconsin asked leave to file her Bill of Complaint in the October Term of 1932, which leave was granted.

BILL OF COMPLAINT

The Bill of Complaint alleges:

(1) That an action was brought in this court in 1923 and that an opinion therein was handed down by this court on the first day of March, 1926, delivered by Mr. Justice Sutherland. That part of that opinion pertinent to the issues here was then set forth in the Complaint.[11]

(2) That both parties submitted forms of decree following the announcement of said decision; that a number of conferences were had by the attorneys in the case, and that as to the boundary in Green Bay the attorneys for Michigan submitted a proposed draft of the boundary description drafted by Thomas R. Halsey, city engineer of the city of Menominee, Michigan, defining its view of the proper course of shipping in Green Bay. That both Mr.

[11]Bill of Complaint, pages 3 to 20 inclusive.

Hasley and counsel for the state of Michigan who lived at Menominee, Michigan, were familiar with conditions in Green Bay, that the description submitted is highly technical and of a nature to mislead one not versed in nautical terms, that both parties accepted the description of the boundary by said Mr. Hasley, believing it to carry into effect the said decision and that said draft was then submitted after acceptance by the parties to the court.[12]

(3) The submitted decree in *Michigan v. Wisconsin*[13] is set forth.[14]

(4) That the decree of the court does not carry into effect the decision of the court in that the line describing the boundary in the decree after leaving the mouth of the Menominee does not turn to the north, and does not pursue a northerly direction to a point opposite the Rock Island passage which lies between Rock Island and St. Martin's Island, and does not run through the Rock Island passage into Lake Michigan. That the boundary after leaving the mouth of the Menominee River runs East by South 7½ miles fully one-half of the distance across the waters of Green Bay, then turns along a line North by East ⅛ East 8⅞ miles, and then follows a line far to the north and east of the boundary line described in the decision. That it does not run through the Rock Island passage into Lake Michigan but cuts off a part of the mainland of Michigan.[15]

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[12]Bill of Complaint, pages 21 and 22.
[13]272 U. S. 398.
[14]Bill of Complaint, pages 22 to 24.
[15]Complaint, pages 25 and 26.

(5) That it was the position of the State of Wisconsin throughout the said trial that the boundary line leaving the mouth of the Menominee River pursues a course to the north; that the State of Wisconsin throughout said action maintained that the words "the most usual ship channel" as used in the Enabling Act of Michigan means the main channel as distinguished from a shipping course. That it was the position of Wisconsin that the "center of the most usual ship channel" is the "center of the main channel" which passes between Rock Island and St. Martin's Island and between Chambers Island and the Michigan mainland, and portions of the brief on behalf of the State of Wisconsin in the former action are set forth in support of said allegations.[16]

(6) That that portion of the decree describing Sugar Island by a legal description and determining it to be a part of the mainland of Michigan is erroneous, in that the description set forth in the decree of Sugar Island, does not describe Sugar Island, in that Sugar Island was never surveyed into lots. That the legal description of lots as contained in the decree describes a part of the Michigan mainland and a part of Grassy Island. (While there is no issue in this case at this time with respect to the Master's findings, conclusions and recommendations as to Sugar and Grassy Islands, no exception having been taken thereto, this part of the Complaint is specified to show errors in the decree.)[17]

(7) That the above errors in the decree were mutual mistakes inadvertently made, that they were not discov-

[16]Plaintiff's Complaint, pages 26, 27 and 28.
[17]Plaintiff's Complaint, pages 28 and 29.

ered until the latter part of the year 1929, that action was not brought sooner because of an endeavor on the part of representatives of the two states in a number of conferences to come to some agreement in modifying the said decree, and that it was impossible to arrive at such an agreement.

(8) That in 1931 the Attorney General of Michigan took the position that if the State of Wisconsin would present this matter to this court, Michigan would not raise any objection to the jurisdiction of the court, but would present their side of the matter and changes as they claim they should be made. That thereupon the State of Wisconsin prepared a motion for a modification of the decree and the State of Michigan served an answer to said motion raising the question of the jurisdiction of the court. That in view of the fact that said motion was not presented within the term within which the decree was handed down, the State of Wisconsin had no other remedy than to ask leave to file a Bill of Complaint.[18]

(9) That both states have avoided any aggression in the disputed area awaiting the decision of this court and that no vested rights have been acquired since said erroneous decree was entered.[19]

(10) That the plaintiff is damaged by the erroneous description in losing an area of 35 square miles which has always been under the jurisdiction of Wisconsin, and that the damage would consist in requiring Wisconsin citizens to take out a Michigan license.[20]

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[18]Complaint, pages 30 and 31.
[19]Complaint, page 31.
[20]Complaint, pages 31 and 32.

(11) That the plaintiff is further damaged by the uncertainty of the rights of its citizens, and that the prayer was to strike the description of the boundary in the decree from the mouth of the Menominee River to the middle of Lake Michigan and to insert in lieu thereof the following description:[21]

> "to the outer end of the piers at Menominee being the center of the harbor entrance of said Menominee River, thence in a direct line to a point half-way from Chambers Island to the Michigan mainland measured from the water's edge at the narrowest channel; thence in a direct line to the west end of the Whaleback Shoal; thence in a direct line to a point half-way from the water's edge adjacent to Boyer's Bluff to the water's edge on the Michigan mainland at the mouth of Bark River; thence in a direct line to a point half-way from the water's edge at Boyer's Bluff to Driscoll Shoal; thence in a direct line to the light on St. Martin's Shoal; thence east three-quarters north to the boundary between the State of Michigan and the State of Wisconsin in the middle of Lake Michigan;"

(12) That the court appoint three commissioners to fix said boundary in detail following the procedure in *Minnesota v. Wisconsin*[22] and that that portion of the decree referring to Sugar Island be modified to carry out the decision of the court.

ANSWER

The Answer of the defendant in this case admits that the decree is erroneous, but in two respects only.

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[21] Complaint, pages 32 and 33.
[22] 258 U. S. 519.

(1) That the language describing Sugar Island is erroneous in that unsurveyed land is treated as being a part of adjoining lots according to public survey,[23] and

(2) That the third course of the boundary as described in the decree after leaving the mouth of the Menominee River is erroneously described as north *by* east ⅛ east, whereas the course intended is northeast ⅞ east.[24]

The prayer of the defendant is that the decree be modified to correct the two errors alleged, and that the bill of complaint be denied in all other respects by reason of the fact that all of the matters therein alleged are res adjudicata.[25]

Other portions of the Answer which allege what the issues were in the former action are discussed on pages 79 to 81.

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[23]Answer, page 9.
[24]Answer, page 2.
[25]Answer, pages 15 and 16.

THE JURISDICTION OF THE COURT

The Special Master made three findings with respect to the jurisdiction of the court. All referred to the former litigation and to the opinion and decree therein.

(1) "That mutual mistakes were made in the decree and that it is absolutely essential that the decree be opened up and the necessary corrections be made to carry out the purpose and intent of the court as expressed in the opinion."[1]

(2) That the decree "was entered by consent of the parties under the mistaken belief that it complied with the opinion of the court."[2]

(3) "That the issue now tendered as to the true location of the boundary line, in the *waters* of Green Bay as distinguished from the islands therein, was not directly involved in the former suit; * * *."[3]

He concluded on each of said findings that this cause was properly before the Court.[4]

The issue of jurisdiction therefore comes before this court on the defendant's exceptions to the second finding (Defendant's First Exception, page 2), the third finding (Defendant's Second Exception, page 4), the Master's second conclusion on the second finding (Defendant's Third Exception page 5) and the Master's third conclusion on his third finding (Defendant's Fourth Exception page 6).

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[1]Master's Report, page 24.
[2]Master's Report, page 25.
[3]Master's Report, page 25.
[4]Master's Report, pages 25 and 26.

MUTUAL MISTAKES IN FORMER DECREE

No exceptions were taken by either party to the findings of the Special Master, that mutual mistakes were made in the decree and that it is absolutely essential that the decree be opened up and the necessary corrections be made *"to carry out the purpose and intent of the court as expressed in the opinion."*[4]

Neither were exceptions taken by either party to the Master's conclusions upon such findings, that "as a matter of law, complainant has the right to have the same corrected in this court and in this proceeding."

This finding and conclusion must therefore be accepted. The defendant's exceptions to the Master's Report specifically relates that the finding is not excepted to.[5]

Defendant alleges that they have been called "transcriptional errors." In order that there may be no misunderstanding, we call attention to the fact that the term "transcriptional errors" are so called by the defendant, not by the Master.

The discussion of the Master in his report, leading up to said finding, not excepted to, sets forth that the Master finds that the description in the decree was furnished by counsel for Michigan, who was familiar with local conditions and nautical terms, and was accepted by counsel for Wisconsin, who was not familiar with nautical terms or local conditions, and that said decree was approved by the court because of such consent.

The Master found that there were at least two errors in the decree that Michigan conceded; first, in the technical

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[4]Italics Ours.

[5]Defendant's Exceptions page 2.

description of the decree in Green Bay in the third course thereof, after leaving the mouth of the Menominee River, and second, that the distance from the center of the outer piers of the Menominee River to the charted sailing course is erroneous.[6]

The Master also found that the language attempting to describe Sugar Island was erroneous.[7]

We contend that no exceptions have been taken to such finding and conclusion of the Special Master, this case is properly before the Court, and the question of jurisdiction does not arise.

It has always been the rule of this court that a judgment or decree entered by mistake may be vacated.

Metcalf v. Williams, 104 U. S. 93.

> "Where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill."

Lawrence Mfg. Co. v. Janesville Mills, 138 U. S. 552.

The defendant in this action seeks relief against the plaintiff, for the correction of the third course in the boundary in the Green Bay area, and for the correction of the description of Sugar Island.

While the Master in his report referred to only mistakes in the decree conceded by Michigan, he undoubtedly had in mind other mistakes, under Michigan's theory of the proper boundary.

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[6]Master's Report, pages 22, 23 and 24.
[7]Master's Report, pages 47 and 49.

Among other errors established before the Master by the plaintiff was that the first course of the boundary in Green Bay described as East by South seven and one-half miles (now conceded by Michigan to be seven and one-eighth miles) was not the most direct line to the shipping course it proceeds to. This is established by undisputed evidence.*

In this portion of his report, the Master refers only to mistakes conceded by the defendant. We contend that the entire decree of November 22, 1926 with reference to the Green Bay area where the mistake occurred must therefore be set aside. It is a fundamental rule of law that mistakes of fact honestly made can be relieved in equity.

Rhode Island v. Massachusetts, 15 Pet 233;
Hews v. Hews, 145 Mich. 247;
Vincent v. Mathews, 15 R. I. 509.

We contend further that by reason of such mistakes the decree as to the areas in which the mistakes occurred must be set aside as a whole. The defendant cannot claim the benefit of that part of such decree which is in its favor and repudiate it as to the remainder.

Connor v. Seattle, 82 Wash. 296.

In *Rhode Island v. Massachusetts,* 15 Pet. 233, boundary commissioners of the two states were assigned the duty of marking and locating the boundary. The location marked was seven miles south of a certain river instead of three, and the plaintiff alleged that the place marked was

*Testimony Col. Lawrence Martin, Record p. 93.

fixed upon by mistake and that the Commissioners of Rhode Island were led into error by confiding in representations of the Massachusetts Commissioner.

A demurrer was interposed on the ground that the court had no jurisdiction and in overruling the same, the court observed that equity could relieve this mistake.

The defendant Michigan contends that the only errors in the decree, are what they term, transcriptional errors. Defendant contends that they are conceded. We concede that the so-called transcriptional errors did occur, in the draft of the decree, dictated by Counsel for Michigan, under their conception of what was a proper boundary. This assumes however, that counsel had authority to describe the boundary by construing or stipulating a construction of the Acts of Congress, and that counsel's construction was correct.

The errors not conceded by the defendant are:

(1) Counsel failed to follow the instructions of the court to locate the boundary in the draft of the decree at the point to which the respective states had exercised jurisdiction;

(2) Counsel usurped the prerogative of this Court, and construed or stipulated a construction of the Congressional Acts establishing the boundary, with counsel for Wisconsin believing a line established by user, was being drawn;

(3) In construing or stipulating a construction of the Acts of Congress, assuming they had a right to do so, counsel failed to apply the rule of law applicable.

(4) The course of the boundary stipulated, did not conform to the opinion of the court, that in leaving the Menominee River, it turned to the north.

(5) The course of the boundary stipulated, did not conform to the contention of either party, and particularly that of Wisconsin, whom the Court said in 1926, had prevailed.

Under Michigan's assertion that only transcriptional errors occurred in drafting the decree, the first line from the mouth of the Menominee River was not perpendicular to the shipping course in the body of the bay as they intended. Some of the errors on their own theory were denied in the pleadings and first admitted before the Master. This hit or miss method of patching up a decree favorable to the defendant, after the opinion of the court had gone against it, is certain to result in error.

It is alleged by the Defendant that the only error aside from what it terms "transcriptional errors" found by the Special Master, is in the construction of the Acts of Congress, defining the boundary, and that this error is not alleged in the Bill of Complaint.

This is not supported by the pleadings. Plaintiff alleges that the decree does not carry into effect the decision of the court, in that the decree does not describe a line which turns to the north, after leaving the mouth of the Menominee River.[9]

It is further alleged that the center of the "most usual ship channel" is the center of the channel and not a shipping course.[10]

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[9]Bill of Complaint, p. 25.

[10]Bill of Complaint, pages 26 and 27.

The same allegations reappear in Reply to Defendant's Answer to Bill of Complaint.[11]

FORMER DECREE IS A CONSENT DECREE

The Decision of this court of March 1, 1926,[12] was the result of careful and deliberate consideration of the issues. The opinion states positively, that the channel claimed by Wisconsin,

> "After leaving the mouth of the Menominee, *turns to the north and pursues a northerly direction* to a point opposite the Rock Island passage, which lies between Rock Island and St. Martin's Island, thence through the Rock Island passage into Lake Michigan."[13]

The follows the significant words:

> "*The result is that complainant* (The State of Michigan) *has failed to maintain her case in any particular; and that the claims of Wisconsin as to the location of the boundary in each of the three sections are sustained.*"
>
> "The decree, therefore, will be for Wisconsin, * * *."

The evidence shows, as do also the pleadings, that the usual motions for the form of decree were made by both the state of Michigan and the state of Wisconsin. The evidence further shows that special counsel for Wisconsin, Mr. Robert M. Rieser, and special counsel for

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[11]Pages 3, 4, 5, 6 and 7.

[12]Michigan v. Wisconsin, 270 U. S. 295, 70 L. Ed. 595, 46 Sup. Ct. Rep. 290.

[13]Italics Ours.

Michigan, Mr. Meredith P. Sawyer, discussed the matter of the decree at Washington, D. C., on Tuesday, November 16, and Wednesday, November 17, 1926.[14] That there were present at that conference, Mr. Ekern, the then Attorney General for the state of Wisconsin, Mr. Rieser, Mr. Sawyer, special counsel for Michigan, and Mr. Daugherty, Attorney General for the state of Michigan. The undisputed evidence shows that these men met in the office of Mr. Justice Sutherland, and that Justice Sutherland in substance advised them, that it was the understanding of the court when it rendered its opinion, that it was not intended to disturb any existing status, so far as sovereignty was concerned, in any part of that boundary; in other words, it was going to leave the states where it found them and where they had recognized their sovereignty extended.[15]

The undisputed evidence shows that at that conference Justice Sutherland did not suggest the wording of the decree, and that no other member of the court was present.[16] Mr. Rieser's recollection is, that immediately after Mr. Justice Sutherland made the statement outlining the intention of the court by its opinion, and that the parties should attempt to dispose of their differences, having in mind the intention of the Supreme Court to leave the exercise of jurisdiction just where it was, counsel withdrew into another room connected with the office of Mr. Justice Sutherland and there prepared the draft of the decree. It is Mr. Rieser's impression that Mr. Justice Sutherland was not present when the discussion between

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[14]Testimony Robert M. Rieser, Rec. p. 7.
[15]Testimony Robert M. Rieser, Rec. p. 9.
[16]Testimony Robert M. Rieser, Rec. p. 8.

counsel took place concerning the location of the line in the water of Green Bay.[17]

The evidence further shows that the present line as it stands in the decree, was either proposed by Mr. Sawyer, or drawn upon Mr. Sawyer's statement, and that Mr. Rieser recognized that Mr. Sawyer was familiar with that region and navigation terms.[18] Mr. Rieser further testified, that following the instructions of Mr. Justice Sutherland to define a boundary which followed the territory over which each state had exercised jurisdiction previously, and that if the parties did not agree they would have to reopen the case, counsel withdrew and made an effort to define such a boundary. That Mr. Rieser went into that conference with the thought that the boundary would be settled upon the basis of jurisdiction. That there was no evidence in the record as to any ancient rights or authority rights being exercised in the triangular area outside of the mouth of the Menominee River in the Green Bay water area. That there was no evidence in the record at that time, as to what point Wisconsin had exercised jurisdiction, and that there was none available at that time. That Mr. Rieser had no other information, but now feels that Mr. Sawyer did.[19]

Mr. Rieser further testified, and his testimony is uncontradicted, that "we assumed from Mr. Sawyer's draft of the definition of this part of the decree (referring to the first course defined in the decree out of the mouth of the Menominee River), that that conformed to the instructions of the court that sovereignty was to re-

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[17]Testimony Robert M. Rieser, Rec. p. 10.
[18]Testimony Robert M. Rieser, Rec. p. 10.
[19]Testimony Robert M. Rieser, Record p. 12, 13.

main as it had been prior to the commencement of the action.[20]

Mr. Rieser states positively that Mr. Justice Sutherland was not present when the decree was dictated, and that it is his impression that the decree as it now reads, is the decree that was handed to Mr. Justice Sutherland by counsel following their conference.[21]

It is plain from the evidence that the decree entered on November 22, 1926, in contrast to the decision of the court of March 1, 1926, was not the result of mature and careful deliberation of the court at all, but a decree entered by stipulation of counsel, and results in what is commonly known as a "consent decree."

We think it plain that neither special counsel for Michigan, nor special counsel for Wisconsin, had any authority to make any concessions or stipulations, as to where the boundary line between the respective states was located, and that the sole authority is vested in the Supreme Court of the United States.

Defendant contends we do not quarrel with the general calls of the boundary as set forth in the decree. This is largely true,—the general calls of the boundary as set forth in the decree are no more specific than the court's opinion, with the exception that the general calls of the decree designates that the line passes north of Green Island. It is of little assistance, however, as it does not say how far north of Green Island.

In the case of *Lawrence Manufacturing Company v. Janesville Mills,* 138 U. S. 552, there was a stipulation between the plaintiff and the Cotton Company to discontinue

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[20]Testimony Robert M. Rieser, Record p. 14.
[21]Testimony Robert M. Rieser, Record p. 14.

the use of a trade-mark. The decree by consent was entered, which also called for a permanent injunction in favor of the plaintiff, but failed to enjoin the successors of the Cotton Company. The defendant, being the successor to the Cotton Company, defended on the grounds that the decree was not in accordance with the stipulation. The plaintiff contended that the decree was incomplete, in that it did not enjoin the successors of the Cotton Company, sought to have it pieced out and then enforced. The court said:

> "Where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill. Hence, even if it be assumed upon the evidence that the decree against the old corporation bound the new one, yet this being in effect, in one of the two aspects, and, perhaps the sole aspect, in which it is framed, a bill to carry the former consent decree into execution, the Circuit Court was not obliged to do so if it believed that decree erroneous, and that it was erroneous we have already decided. Inasmuch as plaintiff came into a court of equity to have the benefit of the former decree, the court was at liberty to inquire whether circumstances justified the relief. Indeed it would seem to have devolved upon it to show that the decree was a right decree."

(citing) *Wadhams v. Gay*, 73 Ill. 415;
Gay v. Parpart, 106 U. S. 679.

> "The prior decree was the consequence of the consent and not of the judgment of the court, and this being so, the court had the right to decline to treat it as res adjudicata."

(citing) *Wadhams v. Gay*, 73 Ill. 415, approved, Gay v. Parpart, 106 U. S. 679;

Jenkins v. Robertson, L. R. 1 Sc. App. 117;
Brownsville v. League, 129 U. S. 493, 505;
Texas & Pacific Railway v. Southern Pacific Co., 137 U. S. 48, 56;
Edgerton v. Muse, 2 Hill Eq. (S. Car.) 51;
Lamb v. Gotlin, 2 Div. & Batt. Eq. 37;
Bean v. Smith, 2 Mason 252.

In the case of *Texas Railway Company v. Southern Pacific*, 137 U. S. 48, 55, there was an agreement between the plaintiff and the defendant company to settle litigation and release various rights. A decree was accordingly entered by consent. The Supreme Court of the State of Louisiana held one of the articles of the agreement illegal and void, and the Supreme Court of the United States said that the decree being entered by consent, and in accordance with the agreement, the courts merely exercising an administrative function in recording what had been agreed to between the parties, it was incumbent upon the Supreme Court of Louisiana to determine upon general principles of law that the validity of the article of the agreement, which they held void, was not in controversy or passed upon in the causes in which the decrees were rendered.

And in the case of *Utah Power & Light Company v. United States*, 42 Fed. 2nd, 304, 308, the court said,

> "The true rule with reference to a consent decree is that, as it has the sanction of the court and is entered as its determination of the controversy, it has the same force and effect as any other judgment, and, in the absence of fraud or mistake, is valid and bind-

ing as such between the parties thereto and their privies. So far as it goes, it stands as a final disposition of the rights of the parties thereto. It may be invalidated by fraud or mistake; it may be shown that the parties who consented thereto had no authority to give such consent. If it is complete, and one of the parties thereto seeks to add or change its provisions, the court may inquire into the justice of the whole decree; * * *."

A consent decree is a mere agreement.

Garett & Co., Inc., v. Sweet Valley Wine Co. (Ohio) 251 Fed. 371;
Freeman on Judgments, 3rd Ed. Sec. 330, page 373.

Assuming that counsel for the respective states in 1926 had authority to stipulate the location of the boundary line, which it is clear they did not have—if such consent was the result of mistake of fact, the rule is that a court of equity will not lend its aid to bind a person by a judgment or decree consented to under a mistake of fact.

Outcalt v. Collier, 8 Okla. 473, 58 Pac. 738;
Rhode Island v. Massachusetts, 15 Pet. 233.

A court of equity has power to open or vacate a judgment which appears to have been entered by mistake or agreement of the parties on adequate grounds, namely, fraud or mistake, or the real absence of consent, if so found, and when it appears that the consent judgment was not in fact consented to by one of the parties, it is error for the court to set so much of it aside as is injurious to the one whose consent has not been obtained. The consent judgment should be set aside in toto.

Bank v. McEwen, 160 N. C. 414.

In *Wellman v. Bethea*, 228 Fed. 882 (S. C.) an administrator who was being sued for wrongful death, failed to set up a plea of plene administravit. Failure so to do made him personally liable. A consent judgment was entered for a large sum, but neither party had in mind the effect of the failure to enter such pleading by the administrator. This was a pure mistake of law. Yet, the court said that the minds of opposing counsel did not meet as to the effect of the judgment to which they consented, and that therefore equitable interference was justified.

It is impossible to read the testimony of Mr. Rieser and not come to the conclusion that the decree of November 22, 1926, is in fact a consent decree based upon error, and one where the court merely recorded what had been agreed to.

Mr. Rieser testified that it was the contention of the State of Wisconsin, after the announcement of the decision, that the proper course of the boundary was so uncertain, that a survey should be made of the entire section, but that the State of Michigan did not feel that they could justify the expense, and that this ultimate decree was an effort to avoid that expense.[22]

Mr. Rieser in describing the conference of counsel for the two contending states, to arrive at a decree says:[23]

> "The boundary as shown was indicated upon the map that he had with him (referring to Mr. Sawyer) was the one that he submitted as conforming to the calls of a boundary following the most usual ship channel in Green Bay. In other words, it was his in-

[22] Testimony Robert M. Rieser, Record p. 14.
[23] Testimony Robert M. Rieser, Record p. 12.

terpretation of what that boundary should be with one exception, I would say, of that boundary from the mouth of the Menominee River out into Green Bay, and as to that he had a different thought, his idea being that there was no shipping into Green Bay from the Menominee River, or from Green Bay into the Menominee River; and his intention was, I mean at that time, that this was open water in which Wisconsin had no jurisdiction, over which it had exercised no jurisdiction, and for that reason the line should be the shortest straight line, and that statement we accepted."

There can be no question that the decree as entered had no basis upon any evidence in the case, and certainly does not comply with the boundary contention made by Wisconsin, which the Supreme Court said on March 1, 1926, was the true boundary line. It is significant that the first course of the boundary stated in the decree, east by south from the mouth of the Menominee River into the water of Green Bay gives to the state of Michigan an area which she did not contend for in the previous suit.[24]

The Decree Resulted from an Unauthorized Stipulation of Law by Counsel

We do not contend that Wisconsin relied upon the defendant's representation, that the line in Green Bay had not been established by user, when in fact it had. True, plaintiff alleges in its Bill of Complaint that a portion thereof, the triangular area had been under the jurisdiction of the plaintiff. The Master held against the plaintiff as well as the defendant in this particular. What the plain-

[24]See Plaintiff's Exhibit 17, Record p. 97.

tiff does complain of, is that it relied upon Michigan's draft of such line, believing that a line established by user was being drafted, as the Court had instructed. Obviously, counsel, acting to assist the court, under the instructions of Justice Sutherland, were limited to describing that line in a proposed decree, only where it had been established by user. In the remaining sections of the boundary in issue at that time, this instruction was followed. The entire opinion of the court was on that basis. Counsel, could have no authority in the absence of a line established by user, to construe the Congressional Acts establishing the boundary, or to stipulate such construction. This, it now appears, is what occurred, with both counsel perhaps, at least counsel for Wisconsin, believing that the course proposed and finally incorporated in the decree, was one established by user, and that the Court's instructions in this respect had been followed.

This is entirely different than the defendant's present contention that both parties knew the line had not been established by the exercise of jurisdiction. Assuming that they did, they still had no right to construe the Acts of Congress. Mr. Rieser's testimony is clear, that he did not know that fact; that he deduced from the fact that Mr. Sawyer proceeded to describe the line, that a line of user was being followed in an area with which Michigan counsel was familiar.[25]

If either counsel was aware of the fact that in this area, a jurisdictional line was not established, that fact should have been brought to the Court's attention, so that the Acts of Congress could have been interpreted by the proper authority.

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[25]Testimony Robert M. Rieser, Record p. 12.

We do not believe the Court intended to locate the boundary within the western channel precisely. We believe the court realized that it had not done so in the opinion, when it said:

> "The boundary seems to be sufficiently defined for all purposes of future possession and jurisdiction."[26]

It is contended by defendant that counsel submitted the approved form of decree to Justice Sutherland, both in the belief, that it would not disturb the status as to sovereignty. We contend this is not the fact. Counsel for Wisconsin, assumed that the description in the decree followed a line of user, which is quite a different thing than that it would not disturb a line of user. Mr. Rieser testified:

> "I think each party, at least I, went into the conference with the thought that we would settle upon that basis, and when the definition was given, I assumed that was the result we had arrived at;" (referring to the instructions of Justice Sutherland to define a boundary which followed the jurisdictional line)[27]

There is no other evidence in this case, concerning the formation of the decree, the part played therein by counsel, the instructions of the Court to counsel pertaining to what was desired, and that plaintiff at least, assumed a jurisdictional line was being drawn, except the testimony of Mr. Rieser. Defendant did not see fit to contradict the same and therefore agrees with it.

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[26]Michigan v. Wisconsin, 270 U. S. 295, at 320.
[27]Record, p. 12.

In our opinion we are charitable in terming the decree of November, 1926, a consent decree. It may more properly be considered as the decree dictated by the State of Michigan.

Yet, the defendant, the State of Michigan, now contends that this procedure in establishing the boundary line, described in the decree, should be binding on the State of Wisconsin, although she herself should have several errors therein corrected.

The first and third exceptions of the defendant deal with the Master's finding in this regard. The Master found that the decree was in fact a consent decree, and that there is no conflict in the record on this question.[28] He concluded that the decree being a consent decree and being erroneous, as he found it to be, it may properly be corrected in this action, and that an erroneous decree resulting from consent of the parties is not res adjudicata.[29]

We contend that both the findings and conclusions of the Master in this regard are correct.

THE ISSUE OF THE TRUE LOCATION OF THE BOUNDARY IN THE BODY OF GREEN BAY IS NEW

In the former action the issue was *in which* channel does the boundary lie. In this action, the issue is, *where is the location of the boundary within that channel.*

The decree proposed by Wisconsin in 1926 was general, as was the opinion of the court, the issue of precise location not being in issue. It is not accurate to say, that

[28]Master's Report, page 25.
[29]Master's Report, page 25.

Wisconsin sought a triangle of water in her proposed decree in the original case.

It is contended by the defendant that this is in the nature of a bill of review. We contend the issue is new, and that the issue in the former action was within which channel the boundary was located. The court determined this without construing the Congressional Acts in its opinion, by pointing out at length the various acts of exercise of sovereignty over the islands between the contending channels, and resting its opinion on that basis. Michigan admits this in her answer in this case.[30]

Assuming that this is a bill of review, the entire conduct of the parties in the draft of the decree, their attempt to invade the province of the Court in stipulating a construction of the Acts of Congress, and the obvious error that the decree did not conform to the court's opinion, must be reviewed.

The defendant contends that "findings of fact on which the original decree is based are conclusive." We do not challenge the findings and conclusions in the court's opinion. We agree with it. We attack only the erroneous consent decree, as not complying with it.

The court found in 1926, that the boundary according to the Wisconsin claim, turned to the north after leaving the mouth of the Menominee and that the Wisconsin contention was correct.

The defendant alleges that the course of the boundary was determined by this court in no uncertain terms in the opinion. We agree with this statement, and assert that this is the law of the case insofar as the issues here pre-

[30]Answer of Defendant, par. 3, page 3, and par. 4, page 4.

sented were therein contained. In such opinion and in unmistakable terms, the court held against the Michigan contention, and held that the Wisconsin contention was correct, *that the line after leaving the mouth of the Menominee turned to the north and pursues a northerly direction.*"

It is alleged that the present issue—the triangular area of water—was the issue in 1926. The issue in 1926 was the entire area between the line proposed by Michigan, to-wit, through the Strawberry Island and Porte des Morts passage, and the line proposed by Wisconsin, lying west of Chambers Island and west and north of Washington and Rock Island."

Actions involving boundaries are equitable causes.

Georgia v. Brailsford, 2 Dall. 415;
Rhode Island v. Massachusetts, 12 Pet. 738, 9 L. Ed. 1266.

A decree is a sentence or order of the court, pronounced on *hearing and understanding* (italics ours) all the points in issue, and determinig the rights of all the parties in the suit, according to equity and good conscience.

Daniel's Chancery Practice, 1192;
Freeman on Judgments, Vol. 1, p. 23.

A decree is pronounced by a court of equity, a judgment by a court of law. The term judgment, is frequently used in a broad sense to include decrees in equity.

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[21] Michigan v. Wisconsin, 270 U. S. 295 at 315 and 319.

[22] See Plaintiff's Exhibit 1, Wisconsin's representations of the boundary proposals of the parties in 1923-26, Record, p. 96.

See also Plaintiff's Exhibit 17, Michigan's representations of the boundary proposals of the parties in 1923-26, Record, p. 97.

Freeman on Judgments, Vol. 1, pp. 23, 24.

While a presumption exists that the judgment covers every matter in the issues, yet that presumption may be overcome by clear proof that no evidence was given as to that fact. It is universally conceded that parol evidence may be received to show whether a question was determined in a former suit.

Freeman on Judgments, Vol. 2, pp. 1455;
Everett v. Everett, 215 U. S. 203; 54 L. Ed. 159.

The position of the plaintiff in this case is that the location of the "centre of the most usual ship channel of the Green Bay" was not in issue in the previous case between these parties; that no evidence was submitted by either party and no argument was made by either party in that case, as to the location of the centre of the most usual ship channel of Green Bay; and that the only issue in said cause between these parties was whether the most usual ship channel was the Strawberry Island passage and the Porte des Morts passage.

The plaintiff was under no obligation in the previous action to tender issues, not necessary to support his cause of action, nor was the defendant, the State of Wisconsin, required to meet issues not tendered by the plaintiff; and if, after the defendant has fully met all of the issues tendered by the plaintiff, there is any matter not admissible by the pleadings, it is generally not concluded by the judgment.

Freeman on Judgments, Vol. 2, pp. 1424.

Recitals in a judgment which are outside the matters in issue and adjudged are not res adjudicata.

Werckmeister v. American Tobacco Co., 138 Fed. 162, 144 Fed. 1023;
74 C. C. A. 682;
(Affirmed) 207 U. S. 375.

It is not the object of the suit that constitutes the estoppel, but the facts put in issue and found.

Caperton v. Schmidt, 26 Colo. 479;
85 Am. Dec. 187.

Matters as to which no issue is made are not concluded even though within the general scope of the litigation, and even though they might have been adjudicated had they been put in issue.

Buckers T. R. Co. v. Platte Valley T. R. R. Co., 28 Colo. 187.

To determine what was adjudicated in a prior action the record in that case may be considered.

DeSollar v. Hauscome, 158 U. S. 216.

And it was said by the United States Supreme Court in the case of *National Company v. Oconto*, 183, U. S. 216, 234, where it was contended that the parties were bound by the decree as entered:

"No doubt to correctly decide what was concluded by the decision of the Circuit Court of Appeals in the creditors' suit and the final decree entered in such cause, it must be ascertained who were the parties to

that cause, what were the issues therein presented for adjudication, and, what was decided thereon. It is elementary, that if from the decree in a cause there be uncertainty as to what was really decided, resort may be had to the pleadings and to the opinion of the court in order to throw light upon the subject, (citing) *Baker v. Cummings*, 181 U. S. 117; *Last Chance Mining Company v. Tyler Mining Company*, 157 U. S. 683, 688."

And in *Barnes v. Chicago, Milwaukee & St. Paul Railroad Company*, 122 U. S. 1, it appeared that there was a former decree with the opinion of Mr. Justice Nelson in *James v. Railroad Company*, 6 Wall. 752, adjudicating that a mortgage was good and valid and a foreclosure be set aside. The Supreme Court of the United States made the following observations:

"Every decree in a suit in equity must be considered in connection with the pleadings, and if its language is broader than is required it will be limited by construction so that its effect shall be such, and such only, as is needed for the purpose of the case that has been made, and the issues that have been decided (citing) *Graham v. Railroad Company*, 3 Wall, 704."

And on the same page it was said:

"The decree, therefore, although broader in its terms must be held to mean no more than that the foreclosure was void as to these creditors * * *."

Whereupon it was held that if a decree in equity be broader than is required by the pleadings, it will be so construed as to make its effect only such, as is needed for the

purpos eof the case made by the pleadings and of the issues which the decree decides.

The nature and extent of a former decree is not to be determined by seizure upon isolated parts of or passages in the opinion considering the rights of the parties, but upon an examination of the issues made and intended to be submitted, and what the decree is really designed to accomplish.

Vicksburg v. Henson, 231 U. S. 259, 272, 273.

And it was said in *United States v. Eastern Transportation Company,* 59 Fed. 2nd, 984, on page 985,

> "To learn what these courts actually decided we are free to look at their opinions, (citing) *National Company v. Oconto,* 183 U. S. 216, 234; *Radford v. Myers,* 231 U. S. 725, 733; *Oklahoma v. Texas,* 256 U. S. 70, 86, especially when the decree incorporates them."

A former judgment is not binding on the parties in a subsequent action by way of estoppel to any question of fact, unless it appears, from the judgment or by extrinsic evidence, that such question was within the issues of the former action and actually litigated and determined therein.

Hopkins v. Lee, 6 Wheat. 109;
Packet Company v. Sickles, 5 Wall. 592;
Aurora City v. West, 7 Wall. 82;
Russell v. Place, 94 U. S. 606.

In the case of *Iowa v. Illinois,* 151 U. S. 238, an original suit was commenced in equity to determine the boundary line between two states. On January 3, 1893, the question

at issue was decided and an interlocutory decree entered placing the boundary between said states as the middle of the main navigable channel. A boundary commission was appointed, who filed their report on March 30, 1893, and on April 10, 1893 an order was entered confirming the Commissioner's report. In October of the same year this action was commenced. The state of Iowa interposed an objection that the order of April 10 was a final finding and decree, and that it cannot be changed or set aside upon motion at a term of court subsequent to that at which it was entered. The court said,

> "In the exercise of original jurisdiction in the determination of the boundary line between sovereign states this court proceeds only upon the utmost circumspection and deliberation, and no order can stand in regard to which full opportunity to be heard has not been afforded."

And in *Oklahoma v. Texas,* 256 U. S. 70, the court said on page 98:

> "We concede that in a subsequent suit upon this cause of action, the question of whether the matter decided on the former case was within the issues then proper to be decided, or was presented, and actually determined in the course of deciding those issues, is open to inquiry, and that, unless it be answered in the affirmative the matter is not res adjudicata.
>
> "What was involved and determined in the former suit is to be tested by an examination of the record and proceedings therein, including the pleadings, the evidence submitted, the respective contentions of the parties, and the findings, and the opinion of the court; there being no suggestion that this is a proper case for resorting to extrinsic evidence, (Citing) *Russell v. Place,* 94 U. S. 606, 608; *Last Chance*

Mining Company v. Tyler Mining Company, 157 U. S. 683, 688 et seq.; *Baker v. Cummings,* 181 U. S. 117, 124-130; *National Foundry & Pipe Works v. Oconto Water Supply Company,* 183 U. S. 216, 234."

The authorities show that the court is at liberty to look into the pleadings, the evidence submitted, the respective contentions of the parties, and the findings and the opinion of the court in order to determine what was involved and determined in a former suit.[33]

In *Oklahoma v. Texas,* the State of Oklahoma brought an original action against Texas to settle a controversy over their common boundary along the bed of the Red River. The United States intervened and set up a claim to the river bed as against both states. Subsequent proceedings resulted in a decree declaring the boundary to be along the south bank of the river.

Oklahoma v. Texas, 256 U. S. 70 and 608.

The court held that the matter of the location of the boundary as between the south bank of the river as Oklahoma and the United States contended, and the medial line of the river, as Texas contended, had been determined in *United States v. Texas,* 162 U. S. 1, 90-91 (The Greer County case) and was res adjudicata. In an interlocutory decree entered (256 U. S. 608) it was said that as it still needs to be determined as to what constitutes the south bank of the Red River, as to where along that bank the true boundary line is, and as to the proper mode of locating the same upon the ground, those questions were set down for further hearing.

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[33]Oklahoma v. Texas, 256 U. S. 70 at 98.

The Court considered these questions of what constitutes the south bank of said river, and where along the same the boundary is in *Oklahoma v. Texas*, 260 U. S. 623. By so doing the court declined to treat the precise location of the line as res adjudicata, although it had determined that the general location could no longer be litigated.

We contend that the present action arises from a similar set of circumstances. This court in its opinion, has determined which channel of Green Bay contains the true boundary, and the general direction of the same from the mouth of the Menominee River, but has not determined its precise location.

Michigan's Bill of Complaint in 1923

The Bill of Complaint of the State of Michigan in 1923 alleged:[34]

> "That there is no conflict in the said boundary as described in the Statehood Acts of the two states so far as the boundary line through the waters of Green Bay is concerned because the Wisconsin Act makes said boundary follow the boundary of Michigan, but that, nevertheless, the state of Wisconsin has possessed itself of and exercised sovereignty over a large part of the waters of Green Bay that are within the grant of the State of Michigan, and over numerous islands of said Green Bay within said grant to the State of Michigan, including Washington Island, a territory of about 15,000 acres or more, Chambers Island with a territory of over 3,000 acres, Plum Island, Strawberry Islands and numerous other valuable islands."

And again the State of Michigan alleges in said Bill of Complaint:[35]

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[34]Page 28.
[35]Page 37.

"As to the Green Bay section of said boundary there is no difference as to the description thereof in the grants of Michigan and Wisconsin or in the constitutional claims of the respective states, but Wisconsin has asserted the claim to, and has taken possession of, and exercised dominion over several large important islands, including Washington Island, Chambers Island, Strawberry Islands, and Plum Island, of a value amounting to several hundred thousand dollars, on the theory that the most usual ship channel of Green Bay runs west and north of said islands, while Michigan asserts and claims the right to jurisdiction and dominion of said islands because the most usual ship channel of Green Bay, June 15, 1836, when the Michigan grant of Statehood was made, ran along the easterly shore of Green Bay from the fort and villages then located at the head of said bay, east of said Chambers Island and Strawberry Islands to Death's Door, the opening of said Green Bay into Lake Michigan and then through said Death's Door south of said Washington Island, Plum Island, and various other islands now claimed by Wisconsin, to the said center of Lake Michigan. And Michigan claims that the said boundary as described in the Michigan Act, following down the center of the main channel of Menominee River to the center of the most usual ship channel of Green Bay ran practically in a projected course from the mouth of said river easterly to the said ship channel in the eastern portion of said Bay, thus leaving Chambers Island and Strawberry Islands on the Michigan side of said most usual ship channel of Green Bay and the said boundary should be established and marked in order that the jurisdiction of the respective states may be known and the properties of each thereof controlled accordingly."

In their prayer for relief in said Bill of Complaint[36] Michigan prayed:

> "That the said line in the last paragraph referred to be decreed to run from * * * * down the center of the main channel of said Menomonie River to the point where said last river enters the waters of Green Bay, thence projected easterly, north of Green and Hat Islands, and south of Chambers and Strawberry Islands in Green Bay to the ship channel in Green Bay, as on June 15, 1836, such channel was used, from the head of said Green Bay along the easterly shore thereof, northerly, between said shore on the east and Chambers and Strawberry Islands on the west, to and thence through and along the center of the channel known as Port du Mort, or Death's Door, south of Washington, Plum and Long Islands, into Lake Michigan and to the center thereof."

> "(c) That by such decree suitable provision may be made for locating and marking said line so that the same may be readily known and recognized."

Attached to said Bill of Complaint is a statement entitled "Explanation of Exhibits referred to in and attached to Bill of Complaint"[37] and under said explanation Exhibit E is described as a diagram prepared to exhibit the points and the area of the disputed territory. That sketch has been enlarged and is one of the exhibits in the present case.[38]

Wisconsin's Answer to Bill of Complaint in 1923

The Answer of Wisconsin to the Bill of Complaint of Michigan in 1923, as to the allegations that Wisconsin had

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[36]Page 43.
[37]Pages 45 and 46.
[38]Wis. Ex. 17, Record p. 97.

possessed itself of, and exercised sovereignty over, waters of Green Bay that were within the grant to the State of Michigan and over numerous islands of Green Bay, alleges:[39]

> "Further answering said complaint * * * * defendant alleges that the territory claimed by Wisconsin, and particularly the islands therein described, were at all times intended by all parties here concerned, to be under the sovereignty of Wisconsin and to be Wisconsin territory, * * * * and that Michigan is without right to any of the islands claimed in and by the allegations of said paragraph."

The answer futher in answering that portion of the Bill of Complaint setting forth the claim of Michigan as to the position of the most usual ship channel and Michigan's assertions and claims to jurisdiction and dominion of Washington, Chambers, Strawberry and Plum Islands, said:[40]

> "Defendant admits that the claims as set forth by the respective parties are in substance as set forth in said paragraphs, but denies that in truth and in fact any of the islands claimed or any of the territory claimed by said state of Michigan properly belongs to said state under her boundaries as defined in the Michigan Enabling Act passed June 15, 1836."

The prayer of the answer[41] of the defendant, State of Wisconsin in 1923 asks that the action be dismissed, that

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[39]Pages 7 and 8.
[40]Page 12.
[41]Page 17.

it be adjudged that the boundary line as claimed by the State of Wisconsin is the true and correct boundary line between the State of Michigan and the State of Wisconsin, and that insofar as there may now be lack of any monuments or any sufficient markers indentifying and establishing said boundary, proper marks of identification be established.

The brief of the State of Wisconsin in 1926 had attached thereto a supplement containing a number of sketches and maps. Counsel for the State of Wisconsin, as counsel for the State of Michigan had previously, furnished in said supplement, a sketch map, showing the boundary claimed by Michigan and Wisconsin, which sketch map is an exhibit in this case.[42]

It is significant that neither Michigan's sketch map, which, in 1923 they claimed illustrated the boundary claimed by the two respective states[43] and the sketch presented by the State of Wisconsin, in the action begun in 1923, to illustrate the respective boundaries contended for by the two states,[44] has thereon any courses or distances from which the precise location of the lines drawn might be determined.

It is significant that a comparison of these two exhibits are extremely similar, except that the Michigan representation of the respective boundary lines is of a more curved nature than is Wisconsin's representation, and that Michigan's representation of the line claimed by Wisconsin in 1923 is nearer Chambers Island than Wisconsin's representation of the same line.

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[42]Wis. Exhibit 1, Record p. 96.
[43]Wis. Exhibit 17, Record p. 97.
[44]Wis. Exhibit 1, Record p. 96.

The Testimony in 1923

The testimony offered by both parties in the action begun in 1923, is silent on the precise location of the boundary line claimed. We have searched carefully through the testimony offered by both parties in the action, in which the State of Michigan was plaintiff and the State of Wisconsin was defendant, in this Court in 1923. and there is not a scintilla of evidence bearing upon the precise location of any courses and distances in the waters of Green Bay, except that upon the modern charts the shipping courses throughout the bay were indicated by a dotted line and the bearing of these courses were marked as is customary upon such charts. In the answer of the defendant, the State of Michigan in the present action, it is contended that the initial course and distance out of the mouth of the Menominee River as is stated in the decree of November 22, 1926 was taken from the testimony of Thomas R. Hasley and is correct.[45] We have carefully searched through the testimony of Mr. Hasley in said former action in 1923 and we are unable to find any testimony on the part of Mr. Hasley in that case, to support such an allegation. We do find that in the present case Mr. Hasley testified that the direction of course East by South was secured by him from Mr. Sawyer.[46]

The Opinion of the Court in 1923-26

It is self evident that the course of the boundary line, which the Supreme Court of the United States determined

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[45]Answer of the Defendant, State of Michigan, page 2 and page 6 and Defendant's Answer to Affirmative Allegations of Plaintiff's Reply, page 2, paragraph 1.

[46]Testimony Thomas R. Hasley, Record p. 47.

on March 1, 1926 was in the channel West of Chambers Island and north and west of Washington and Rock Island, was not precisely located by that tribunal. The State of Michigan contended that the Strawberry Island passage and the Port du Mort Passage, was the "most usual ship channel" which Congress on June 15, 1836 said that the boundary line followed the center of. The State of Wisconsin, on the other hand, contended that the channel west of Chambers Island and north and west of Washington and Rock Island, was the "most usual ship channel." Obviously if there were any testimony as to the precise location of the "centre" of the channel it would have been put in by Wisconsin, since it was this channel that she was contending for. The State of Michigan throughout the case, shunned the channel claimed by Wisconsin, and would have nothing to do with it. An examination of the opinion in the case of the *State of Michigan v. the State of Wisconsin* decided March 1, 1926,[47] makes it clear that the precise location of the line within the channel was not in issue.[48]

It is evident, that the parties were concerned entirely with the question of dominion and jurisdiction over the islands lying between the two channels contended for by the respective states.

The Pleadings in This Cause

It is however, unnecessary to search the pleadings of the parties in 1923, the evidence submitted, their respective contentions and the findings and opinion of the court, as is suggested in *Oklahoma v. Texas*,[49]—the answer of the de-

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[47]270 U. S. 295; 46 S. C. R. 290.

[48]State of Michigan v. State of Wisconsin 270 U. S. 295 at 314 to 318 inclusive; 46 S. C. R. 290 at 296-297 inclusive.

[49]256 U. S. 70.

fendant Michigan, in this action, standing alone, shows clearly, that the definite course of the boundary in the waters of Green Bay was not in issue in 1923. The defendant says in its answer:

> "Answering the allegations of paragraph 6, the defendant again denies that the State of Wisconsin ever took any position during the trial with reference to the boundary line between the mouth of the Menominee River and the most usual ship channel in Green Bay and in this respect the defendant alleges that throughout the trial the issue between the parties was the jurisdiction over the islands in Green Bay and in the entrance thereto, and that the entire effort of both parties was directed at the determination of the most usual ship channel with relation to these islands * * * and all testimony and arguments were directed at the ship channels passing from Lake Michigan to the city of Green Bay at the foot of the bay, and it was only after the filing of the opinion that attention was directed to the matter of description of the line from the mouth of the Menominee River to the ship channel adopted by the court in its opinion."[50]

And again in the defendant's answer it is stated:

> "Answering the allegations of paragraph 4 of the Bill of Complaint, defendant admits that the quotations from the opinion there set forth are true, but denies their application to the present situation, and in this respect alleges that there was never any claim on the part of the State of Wisconsin, defendant in said original suit, bearing upon the course of the boundary in Green Bay, other than as to jurisdiction over the islands involved until after the filing of said opinion."[51]

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[50]Answer of Defendant, Michigan, page 5, paragraph VI.
[51]Answer of Defendant, Michigan, page 4, paragraph IV.

And again in the Defendant's Answer to the Affirmative Allegations of the Plaintiff's Reply, it is stated and alleged by the defendant, State of Michigan, pertaining to the action of 1923 between these parties:[52]

> "This defendant reasserts that no definite description of the boundary in Green Bay had been considered by either party prior to the filing of the opinion of this court, and denies that Wisconsin offered any evidence of shipping courses that passed from the mouth of the Menominee River as alleged; * * *."

> "In this respect, Michigan alleges that during the trial of the former case the issue was as expressed, jurisdiction over the islands lying between the two main ship channels from Lake Michigan through Green Bay to the village (now city) of Green Bay."

In the former action the defendant, Wisconsin, merely defended its right to water and land areas which the plaintiff, Michigan, attempted to secure by way of affirmative relief. In the Green Bay area, the line proposed to be adopted by the plaintiff, Michigan, was in the Strawberry and Port des Morts Passage, far to the south and east of what Wisconsin contended was the true line. The State of Wisconsin in 1926 did not ask for any affirmative relief against the State of Michigan.[53] This is admitted by Michigan in this cause.[54] This being true, the only issue was whether the line proposed by Michigan should be adopted or not, and this court declined to adopt the same.

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[52]Paragraph 3, page 3.

[53]Answer of Defendant, Wisconsin; 1923-26, page 17.

[54]Answer of Defendant, Michigan, paragraph V, page 5.

The Evidence in This Case

Colonel Lawrence Martin who was a witness in the action between the State of Michigan and the State of Wisconsin in 1923, testified in this action that the context of the briefs was to the effect, that the islands lying on one side or the other of those lines belonged to one state or the other.

Mr. Robert M. Rieser, Special Counsel for Wisconsin in the former case, testified that there never was any evidence as to the precise location of any channel.[55]

He testified further that neither Wisconsin or Michigan made any claim at that time, as to the precise course of the boundary in Green Bay:

> "It was our claim after the announcement of the decision that the proper course of this boundary was so uncertain that a survey should be made of this entire section, but Michigan did not feel that they could justify that expense, and this ultimate decree was an effort to avoid that expense."[56]

And he testified that there was no issue as to where the precise line should be; that the issue was entirely whether the line should be through one channel or the other.[57]

Mr. Rieser testified that subsequent to the announcement of the decision of the court on March 1, 1926, he and

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Mr. Rieser was examined on the matter of what was in issue between the State of Wisconsin and Michigan in 1923 and a part of his testimony is as follows:

"Q. Now the issue in the main case, as I gather it, was a determination of whether it would be the western channel or the eastern channel?

"A. In the Green Bay?

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[55]Testimony Robert M. Rieser, Record p. 15.

[56]Testimony Robert M. Rieser, Record p. 14.

[57]Testimony Robert M. Rieser, Record p. 11.

Mr. Sawyer traveled down a portion of the Menominee River for the purpose of viewing the route of the boundary, and that while other matters in issue were discussed, there was no discussion concerning the precise line in Green Bay at that time.

"Q. Yes. Was there any evidence in the case at all as to the precise course of the boundary line through the Green Bay section?
"A. No, except as it would indicate—I will withdraw that. Not as to the precise line.
"Q. Both the plaintiff and defendant submitted some charts?
"A. Some charts.
"Q. As to the line claimed by each side?
"A. Yes.
"Q. But there was no precise line of description?
"A. No, there was no evidence of anything to indicate that.
"Q. How did you obtain this line as it now appears in the decree?
"A. Well I think primarily from Mr. Sawyer on his statement that that was correct and he based his information on the different maps that were referred to, to certain sailing courses or shipping courses that appeared on some government maps for that region.
"Q. Recent maps?
"A. Most of them, all of them recent maps."[58]

* * * * *

"Q. The line defined in the decree, does it or does not, comply with the line claimed in your brief and on Exhibit 1 as the boundary for Michigan and Wisconsin?
"A. Well, Mr. Bieberstein, up in this region here it certainly does not. I mean the region north or above Chambers Island. In the region below Chambers Island there was no specific claim made as to a specific course or distance it would follow. That was left very general as is indicated by the line shown here, and that for the reason that in a given area there was no particular dispute or particular argument as to where the line should be during the trial of the case with the possible exception of the bay of the Menominee River and as to certain islands. Out in the Green Bay section the issue was entirely confined as to whether the line, the dotted dashed line through Strawberry passage and Death's Door passage, or the dashed line west of Chambers Island and through Rock Island Passage, should be it."[58a]

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[58]Testimony Robert M. Rieser, Record p. 11.
[58a]Testimony Robert M. Rieser, Record p. 11.

We believe it clear that no issue was ever made in the former action between the State of Michigan and the State of Wisconsin, concerning the location of the boundary in the waters of Green Bay other than it was contended to be in one channel or another. We have pointed to the pleadings of the parties, to the evidence submitted, to the respective contentions of the parties, the findings and opinion of the court, the admissions in the defendant's answer herein and the testimony of Robert M. Rieser who was Special Counsel for Wisconsin in that case.

True, Michigan contends that the issue of the location of the line within the ship channel was litigated in 1923-26 after the delivery of the opinion. We contend that issues are not settled on motions, which together with the conferences of counsel, were the only proceedings, subsequent to the decision.

Motions are not available to settle important questions of law or to dispose of the merits of the case.

> *Illinois Central Railway Co. v. Adams,* 180 U. S. 28 at 38, 21 Sup. Ct. Rep. 251 (and cases cited).

It is contrary to all right to finally determine legal claims on motion and affidavits

> *Lyon v. Smith,* 66 Mich. 676.

LOCATION OF THE BOUNDARY BY DOMINION AND ACQUIESCENCE

Before the Special Master both parties contended that they had established right to the disputed area by possession, dominion and acquiescence.

The Master found that neither state or its citizens had exercised such long-continued and exclusive possession of the disputed area, as would constitute the exercise of dominion by one state to the exclusion of the citizens of the other state,[59] and concluded that neither state has shown such an open, long-continued, uninterrupted and peaceable possession of the disputed area and the exercise of dominion and sovereignty over it, as to establish any definite line as the true boundary line in Green Bay.[60]

Wisconsin did not except to this finding and conclusion, but the defendant Michigan did.[61]

In this entire argument Michigan assumes her possession of the disputed area and challenges Wisconsin to upset the same, claiming that if we fail to show a long period of possession and exercise of jurisdiction, she is entitled to the disputed area. She has, however, never proved such possession which she assumes and the Master has found neither party to have acquired this area by user.

We contend that the record made before the Master not only fails to show any exercise of dominion and sovereignty over the disputed area by the defendant Michigan, but shows a strong case of the exercise of dominion and sovereignty by the plaintiff, Wisconsin. A great portion of the evidence in this case dealt with this phase of the

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[59]Master's Report, pages 27 and 29.
[60]Master's Report, page 30.
[61]Defendant's Fifth Exception, page 7.

controversy. The plaintiff did not except to the Master's findings and conclusions in this respect, notwithstanding the fact that the record is in its favor in this particular, because it is felt that the volume of evidence in plaintiff's favor, still falls short of that degree of proof required to fix boundary lines on this basis. We contend that the evidence in defendant's favor falls even further short of the necessary degree of proof to so establish the boundary.

Michigan seriously, in fact urgently insists that she was in sovereign possession of the so-called triangle at the time of the formation of the decree and that the record here supports that statement. We cannot understand the basis for such a claim; her own witness, a Michigan warden, testified he understood the steamboat line from the mouth of the Menominee to the objective two miles west of Chambers Island—the western side of the triangle—to be the true boundary.[62] We insist that except for Captain Ellsworth's general statements there is no evidence of such attempts at possession in the record.

EVIDENCE NEGATIVING THE ESTABLISHMENT OF THE BOUNDARY AS CONTENDED BY THE DEFENDANT BY DOMINION AND ACQUIESCENCE

The Boundary Portrayed on Michigan's Official Maps

A large number of maps and proper copies thereof are in evidence in this case. Some are termed official and others non-official. The distinction in general was pointed out by Colonel Lawrence Martin, in that a map published by a state, or by a branch of the federal government, or one published by the United States is an official map.[63]

[62]Testimony Herman Leisner, Record, p. 46-47.
[63]Testimony Col. Lawrence Martin, Record p. 60.

Plaintiff has put in the record in this cause, eight maps, which we contend are official maps, published by the State of Michigan, portraying the boundary in the Green Bay area. Each of these maps is taken from the Michigan Official Directory and Legislative Manual, published by the State of Michigan, under the direction of its Secretary of State. They each appear in each publication of this manual, which is every alternate year from 1917 to 1931 inclusive, except Wisconsin Exhibits 2, 36 and 37. Exhibit 2 appears in said manual from 1919 to 1931 inclusive; Exhibits 36 and 37 in 1925. These maps are very much alike. Exhibits 3 and 36 are reproduced in this record.[64]

Defendant contended before the Master that no serious consideration should be given to this series of maps because they are on a small scale, the boundary portrayed is general and somewhat conventional. We took them, of course, as we found them. While it is true that they are on a small scale, it can be readily ascertained therefrom that they fail to bear any resemblance to the line that the State of Michigan now contends for, and are strikingly similar to the line proposed by the plaintiff.

The terminating of the line on some of these maps is caused by the word "Menominee," printed thereon. It suggests only that the geographer in placing the line expected the line to pass out of the Menominee river to that terminus, and not that he was in doubt as to where the line proceeded.[65]

These maps published in an official Michigan publication, show conclusively where the reputed boundary was considered to be on the part of the State of Michigan, not only before the decision and decree of 1926, but thereafter.

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[64]Record, pp. 94 and 95.

[65]Testimony Col. Lawrence Martin, Record p. 98.

Figure 1. Sketch of Public Surveys in Michigan, published by the Surveyor General's office at Detroit, Michigan, Nov. 1, 1855. Wisconsin Exhibit 12.

The Boundary Portrayed on Other Official Maps

a. On November 1, 1855, the Surveyor General published a sketch of the public survey of Michigan. A heavy line appears to designate the established boundary between the upper peninsula of Michigan and northeastern Wisconsin.

This map's significance lies in the recognition of the boundary by the Federal Land Office some nineteen years after the Michigan Enabling Act establishing the same.

b. We have already referred to the expedition of Captain Thomas Jefferson Cram of the War Department, pursuant to the resolutions of Congress in 1840. The complete text of his first report of 1840, the various letters of transmittal thereof, and the map attached thereto, Map 4, are in evidence.[66] While we do not contend that Cram delineated upon this map, the boundary between Wisconsin and Michigan, we do contend that he thereby exhibited to his superiors the ship channels in Green Bay by dotted lines labeled "ship channel."

This Court, by its decision of March 1, 1926, and its decree of November 22, 1926, has certainly, definitely and finally established that the boundary follows the ship channel west of Chambers Island and the ship channel through the Rock Island passage. While we contend that Cram did not intend to describe a shipping course, he did intend to describe a ship channel, the center of which was the boundary. It is significant that he places the lines indicating the position of the ship channel so far as the same is a part of the boundary between Michigan and Wisconsin, in substantially the position which Wisconsin contends

[66]Wisconsin Ehibit 38, Record pp. 99-118.

is the true boundary, and that the said ship channels designated bear no resemblance whatever to the boundary proposal of Michigan.

Colonel Lawrence Martin testified that Cram was a man eminently acquainted in every detail as to what was intended as to a boundary; what were the difficulties in establishing it, and that Exhibit 38 and Map 4 attached thereto, seemed to him to be the most official in connection with the present proceedings, and in some respects the most important map that we have with respect to the boundary in the Green Bay area.[67]

The map of Captain Cram, in our opinion, is the most important exhibit in this case—first, because it is the map of an engineer who was instructed to locate the route of the boundary, by the legislative body which had created it; and secondly, it is the nearest official designation of ship channels to the Michigan Enabling Act, being only four years removed therefrom.

The Reputed Boundary as Described by Witnesses

A large part of the testimony in this case was devoted to the testimony of witnesses in the vicinity of the disputed area. Witnesses of this character were called by both plaintiff and defendant, and ranged in age from twenty-four to eighty. The majority were engaged in fishing, some in sailing, others in piloting vessels, and still others who had retired from the fishing or sailing occupations. As a general proposition these witnesses testified to two things—first, the location of the generally accepted, understood and reputed boundary line in the water area of Green Bay, and secondly, the grounds upon which they

[67] Testimony Col. Lawrence Martin, Record p. 68.

customarily fished, recognized as within the domain of one state or the other. In this connection most of them related the holding of fishing license in the two respective states.

To assist the witnesses, a large map of the area was prepared and is labeled Combined Exhibit 1. It appears opposite page 1 of the Exhibit Album. Upon it the Michigan boundary proposal is shown in red, and the Wisconsin proposal in blue. Reference in the testimony of these witnesses is therefore to the red or blue line, meaning the Michigan or Wisconsin boundary proposal.

In the Menominee and Chamber's Island area, reference is made by some witnesses to the steamboat course. This refers to the sailing course from the mouth of the Menominee River in a straight line to the sailing objective two miles west of Chamber's Island light.

In lieu of reproducing said Combined Exhibit 1, the parties have stipulated that it corresponds to the map contained in the Master's report.[68]

We do not deem it necessary to detail the testimony of these witnesses. The Master found that no certain, definite and ascertainable boundary line has been established in the waters in controversy by the exercise of exclusive dominion over the same by either of said states.[69] The defendant alone excepted thereto, but contends that it is not their position that the boundary was so established. It is their position that they had possession of the area in dispute, and they make some attempt to distinguish such a contention, from that upon which the Master found. The

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[68]Record p. 17.

[69]Master's Report, p. 29.

defendant relies principally on an annual patrol in these waters by Conservation boats of the State of Michigan.

Prior to the enactment of laws requiring resident and non-resident fishing licenses (1907), it was of little importance where the boundary was located. The principal evidence of such patrols was the testimony of Captain Robert E. Ellsworth, who testified that such patrols began in 1912 and that he continued therein until approximately 1927.[70] On cross-examination it developed that said patrolling took place approximately once a year, remaining several days, sometimes a week, and not always in the fishing season. He conceded that in the Section south and west of Chamber's Island (the triangular area) "we done very little work".[71] In spite of the large number of fishermen who fished in the area most of their lives, Captain Ellsworth, whom it is now contended enforced Michigan law in this area, never made any arrests of Wisconsin fishermen in the disputed waters during all of the time he was in service.[72]

Mr. Leisner, another warden called by Michigan, testified that they never patrolled the line proposed by the defendant in the neighborhood of the Menominee River and Chambers Island at all, and that they considered the steamboat line from the mouth of the Menominee River to a point two miles west of Chamber's Island Light, (the western side of the triangle)as the boundary.[73]

In spite of Michigan's present contention that line so alleged to have been patrolled, was at all times considered by them to be the boundary, the fact remains that until

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[70]Testimony Captain Ellsworth, Record p. 18.
[71]Record, p. 18.
[72]Record p. 23.
[73]Testimony Herman Leisner, Record p. 46-47.

1926 they contended the Strawberry and Porte des Morts passage to contain the boundary. This alleged line lies far to the east of the red line. We believe it is a fair conclusion that from 1912 to 1926, when Michigan was supporting a different boundary, the patrols on the red line, if they were made, were not conducted under the claim that the red line was the boundary.

During the period of said patrol no arrests were made of Wisconsin fishermen in the disputed area.[74]

Lawrence Voight a witness produced by the plaintiff, testified that about 1910 the buoy on the Whalesback Shoal used to be marked "Wisconsin."[75] Emil Nelson saw the Wisconsin marking on the buoy at the Whalesback 25 years ago.[76]

Most of the witnesses who evidenced knowledge of the patrolling as alleged by the defendant, testified that it took place very recently.

It is significant that there is not a single witness in the entire case, Michigan or Wisconsin, who placed the reputed boundary line in the Menominee River and Chambers Island area, as the red line on Combined Exhibit 1, except Captain Ellsworth, a Michigan Conservation Officer, who testified that he had absolutely no information that such was the line but that it was his own construction of the words of the Michigan Enabling Act contained in the Michigan Manual. This witness expressed entire unacquaintance with the maps in the Michigan Manual portraying the boundary line, which are in evidence in this case. Captain

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[74]Testimony Captain Ellsworth, Record p. 20.
[75]Record p. 35.
[76]Testimony Emil Nelson, Record p. 30.

Ellsworth stands out as the only proponent and supporter of the line contended for by Michigan in this area. It will be remembered that the instructions of the Supreme Court were, that the line in the decree was to follow the generally accepted line, and yet from this mass of testimony only one man was found who testified that the boundary proposal of Michigan was the accepted line; and even he admitted that it was not the reputed line at all, but the line which he had arrived at by his personal construction of the words of the Michigan Enabling Act."[77] It seems quite apparent therefore, that in this area the reputed boundary line is either the blue line or the steamship line marked "SW ¼ W".

Judicial Determination of the Boundary

Through the entire period of the history of the respective states of Wisconsin and Michigan, it would seem that the matter of the jurisdiction of the respective states would have arisen a number of times. It appears, however, that in the Green Bay area, there are only two cases where the question of jurisdiction was involved.

The first is a prosecution for spawn fishing in the neighborhood of Washington Island, to which several witnesses have made reference. Unfortunately, except for the recollection of witnesses in this matter, which occurred more than thirty years ago, there seems to be no means of locating precisely the alleged violation.

In April, 1908, three cases were commenced in the Circuit Court of Marinette County, Wisconsin. The plead-

[77]Record, p. 20, 21.

ings, together with the verdict of the jury, the order for and judgment, are in evidence in this case.[78]

In the first action one Eli Christenson was plaintiff; in the second one James Pedersen was plaintiff, and in the third case one Charles Nylund was plaintiff. Frank Seidl was substituted as party plaintiff in the latter action after the proceedings had been commenced.

These three cases were actions in replevin, brought by these plaintiff fishermen against the defendants, who were Michigan conservation officers, alleging that said conservation wardens wrongfully and unlawfully took possession of fish nets. The question of whether or not they were unlawfully taken, depends of course upon whether or not the fish nets were seized by the Michigan wardens, within the jurisdiction of the State of Michigan, or the State of Wisconsin.

The nets were located by the jury by their verdict. The judgment of the Court in favor of the plaintiffs on the verdict of the jury, makes the conclusion that the nets were seized in Wisconsin waters.

In each case the jury located the east end of plaintiff's nets; the Christenson nets with relation to Chambers Island Light and the Pedersen and Nylund nets with relation to the Christenson nets.

Mr. Seidl who was substituted as a party plaintiff in the Nylund case stated the length of the Nylund nets, the number of nets in a gang and the direction in which the gangs extended.[79]

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[78]Wisconsin Exhibits 31-32-33, Record, p. 122-131.

[79]Testimony of Frank Seidl Record p. 50, 51.

Witness Pedersen, plaintiff in one of the actions, stated the length of his nets, the number of nets in a gang, and the direction in which his gang of nets extended. He testified that all three groups of nets were parallel to each other.[80]

From such information of the number of nets in a gang and the length of each net, Captain Angwall determined the length of the gangs of nets which were confiscated. From the verdict of the jury in each case Captain Angwall made the necessary measurements on defendant's Exhibit "E" and thereby determined the east end of the groups of nets involved in the three cases. He then determined the length of the gangs of nets and the direction in which the same extended, and the precise location of the gangs confiscated in each case, so that the line "AB" on defendant's Exhibit "E"[81] represents the location of the Christenson nets; the line "EJ" the location of the Pedersen nets, and the line "FK" the location of the Nylund or Seidl nets.[82]

The defendant called Mr. John Tracy, who was attorney for the defendants in these three cases. Mr. Tracy testified that the position of the nets as located by Captain Angwall on defendant's Exhibit "E" would be about the location claimed by the fishermen, which the jury found was the true location, although he stated that he would hardly think that the nets were as long as from "A" to "B".[83]

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[80]Testimony of James Pedersen Record p. 49, 50.
[81]Defendant's Exhibit E, Record, p. 130.
[82]Testimony Captain Angwall, Record, p. 51-53.
[83]Testimony John E. Tracy, Record, p. 56.

While there may be some error in the determination of the length of the nets of Mr. Christenson, there is no such difficulty in determining the lengths of the nets of Mr. Pedersen and Mr. Nylund or Seidl. Mr. Pedersen himself took the stand and gave us this evidence. Mr. Seidl, who was substituted as party plaintiff for Mr. Nylund, also gave us similar evidence.

The judgment in each of these cases was in favor of the plaintiffs. The result is that the Circuit Judge held that these nets were located in Wisconsin waters. It is significant that all three gangs of nets extended across the shipping course which is the Michigan boundary proposal. This judicial construction of the location of Wisconsin waters is not in harmony with the Michigan boundary contention, but is in entire accord with the Wisconsin boundary contention.

THE TRUE LOCATION OF THE BOUNDARY

PARTIES' CONSTRUCTION OF CONGRESSIONAL ACTS

The Special Master declares in his report that both parties contended that the "main channel" referred to in the Wisconsin Territorial Act[1] and the "most usual ship channel," referred to in the Michigan Enabling Act[2] had reference to a channel in the body of Green Bay itself.

He found that practically this entire body of water is one wide channel, that the whole area outside the shoal water near the shore lines was traversed by ships in 1836, and that there was no such thing as a "main channel" or a "most usual ship channel" in the body of Green Bay at the time of the adoption of said Acts of Congress.[3]

He further found that there was no such thing as a charted sailing course, or any well-recognized or defined ship channel in the waters of Green Bay in 1836.[4]

The Master concluded that under the law, in this land-locked bay, the geographical center of that portion of the bay involved would be the proper boundary, the portion involved being that portion lying north of the mouth of the Menominee river, west of Chambers Island and south of a line drawn due west from the center of the Rock Island passage to the Michigan mainland.[5]

To these findings and conclusions, the defendant, State of Michigan, excepted in toto.

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[1]5 U. S. Stats. at L., 10.
[2]5 U. S. Stats. at L., 49.
[3]Master's Report, pages 33 and 34.
[4]Master's Report, page 31.
[5]Master's Report, page 37.

The plaintiff, Wisconsin, excepted to the Master's findings respecting the degree of reliance to be placed on the maps and Captain Cram's report in this regard, to his findings that no "main channel" or "most used ship channel" existed in Green Bay in 1836, and to the description of said geographical center line upon the map attached to the Master's Report.

The conclusions of the Master that under the law, the geographical center of the bay is the proper boundary, is the contention of the plaintiff. In describing the same, the Master stated that the line would substantially follow line ABC on map attached to Master's Report, and thence northerly in the center of that portion of the bay until it intersects a line extended from the point Q on the map to the Michigan mainland.[6] We contend, and we believe the Master intended to describe a geographical center line, not only in that portion of the bay extending generally north and south, but also in that portion of the bay lying in the Rock Island passage. The exceptions of the plaintiff to this conclusion, result from the fact that a line extended from point Q on map attached to Master's Report, to the Michigan mainland, would not be in the geographical center of this portion of the bay, and that point Q is not in the geographical center of the Rock Island passage.

We contend that the most valuable map in evidence in this cause, is Map 4 attached to the report of Captain Cram.[7] It was drawn by a competent engineer, sent into the area for the specific purpose of finding the "most usual

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[6]Master's Report, page 37.

[7]Wisconsin Exhibit 38. Record p. 99.

ship channel," by the identical body that created the boundary, and only four years removed therefrom.

If by the findings of the Master that there was no "main channel" or "most usual ship channel" in the body of Green Bay in 1836, he meant a shipping course, or a precise line which ships customarily followed, we agree with his findings. We believe that is what the Master meant. We contend that the entire body of the bay constituted the "main" or "most usual" ship channel, in the area where there were no intervening islands.

The boundary having been created almost one hundred years ago, obviously no living witnesses are available to describe the customary shipping courses. The territory was uninhabited, except by Indians. Plaintiff contends, as the Master finds, that while there were occasional ships sailing on Green Bay prior to and about the year 1836, they were mostly sailing vessels, which followed no mapped or charted course.

Accordingly the Master recommended that if this Court should adopt the construction of the Congressional Acts contended for by the parties; that is, if this Court should adopt the view that the "main channel" or "most usual ship channel" refers to a ship channel in the body of Green Bay and west of Chambers Island, as well as at the entrance thereof,—then the line be drawn from the center of the outer ends of the Menominee River piers, thence north and eastward in the geographical center of the portion of Green Bay lying west of Chambers Island to a point where said line would intersect a line extended westward through the center of the Rock Island passage to the Michigan mainland, and thence easterly on said line,

through the Rock Island passage to the center of Lake Michigan.[8]

To said findings, that there was no "main" or "most usual ship" channel in the body of Green Bay in 1836, both parties excepted.[9]

To said findings that there was no necessary track of navigation in Green Bay in 1836, the defendant alone excepted.[10]

The plaintiff excepted to the Master's conclusions thereon, only insofar as the course of the geographical center line was outlined on the map attached to the Master's Report.[11]

Defendant alone excepted to the entire conclusions and recommendations of the Master thereon.[12]

Early Navigation on Green Bay

We propose to show that the entire body of Green Bay, lying west of Chambers Island and northward through the entrance at the Rock Island passage into Lake Michigan, is the "main" or "most usual ship" channel, was so in 1836, and that the "middle" or "centre" thereof, is the geographical center, as the Master concluded but did not accurately describe. We propose to show that there was no line or course of shipping on Green Bay in 1836 and no established shipping courses until 1863.

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[8]Master's Report, page 45.

[9]Plaintiff's Exceptions—4, 5, 6 and 7, pages 2 amd 3; Defendant's Exceptions—6 and 7, pages 8 and 9.

[10]Defendant's Exceptions—6 and 7, pages 8 and 9.

[11]Plaintiff's Exceptions—8 and 9, page 3.

[12]Defendant's Exceptions—8 and 11, pages 12 and 14.

In considering the arguments of the parties, a definition must first be arrived at for the words "channel", "main channel" and "ship channel".

Colonel Martin testified that as used in the Michigan Enabling Act, it meant a passage, or straits, and that its only relation to a shipping course, was that charted shipping courses go through ship channels. (Testimony Col. Lawrence Martin, Record, p. 74) Plaintiff has used the word "channel," in this sense. The defendant uses it in sense of meaning a line of shipping.

The undisputed evidence shows that before 1836 and for almost thirty years thereafter, there were no precise sailing courses on Green Bay.

The lumber industry began to flourish, but it was not until 1863 and 1864, that we find sailing courses, first charted upon maps in the Green Bay area, with directions for sailing these courses.[13]

John Cornell, who testified that he traveled in the "Rocket" in 1873 on his way to Green Bay, stated that the ship traveled down the bay, west of the Whalesback (referring to Whalesback Shoal in the center of the bay). This witness said that as late as 1877, ninety per cent of the vessels were sail.[14]

Soundings were first made of depths of water in Green Bay in 1845, as appears from charts in evidence.[15]

The first charted shipping courses appearing on charts of the Green Bay area is found in the charts of 1863 and 1864, nearly thirty years subsequent to the creation of the

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[13]Testimony Col. Lawrence Martin, Record p. 65-66.
[14]Testimony John W. Cornell, Record p. 25, 26.
[15]Testimony Col. Lawrence Martin, Record p. 62, 63.

boundary. The sailing courses there shown are at variance with those exhibited on the modern charts, which the defendant proposes as the boundary.

These charts were interpreted by Col. Lawrence Martin. He testified that the same were published in 1864, that as Chief of the Division of Maps in the Library of Congress, he had in his custody more than a million maps. He testified that he knew of no map or chart, earlier than Wisconsin Exhibit 22 (published in 1864) that shows any charted shipping courses on the waters of Green Bay.[16]

We quote from Col. Martin's testimony:

"After extensive reading over a period of more than twenty-five years, I have never heard of any such directions (referring to sailing directions) that applied to the ship channel west of Chambers Island. With respect to the ship channel in what we now call the Rock Island Passage, I cannot recall at the moment whether there was more than one map in the Wisconsin-Michigan boundary case of 1923-1926 that bore upon that matter, but there is one map in this record that came from that, and that is Farmer's map of 1830, which shows a line marked 'ship chan.' * * * I am sure it does not give any courses, which may be followed by navigators."[17]

Upon the evidence of record, the Master was obliged to find that there was no such thing as a charted sailing course, and that practically this entire body of water is one wide channel, as he did.

Ship Channels in Green Bay in 1836

It is our contention that the "main" and "most usual ship" channel described by Congress, had reference to the open water area, extending from shore to shore. As a result the said "channel" in the Menominee River area ex-

[16]Testimony Col. Lawrence Martin, Record p. 65, 66.
[17]Testimony Col. Lawrence Martin, Record p. 93.

tends from the westerly shore of Chambers Island to the Michigan mainland; north of Chambers Island to the area extending from the Michigan mainland to the Door County Peninsula of Wisconsin; in the Washington Island area from Boyer's Bluff on Washington Island to the Michigan mainland, and in the Rock Island Passage, to the area between St.Martin's Island (Michigan) on the north, and Washington Island and Rock Island (Wisconsin) on the south.

In support of this definition of the word "channel," and that this was the interpretation ascribed to it by Congress in 1836 we cite.

1. Captain Cram's Report[18]

This report was made in 1840. The term "centre of the most usual ship channel" and "channel" is used throughout said report, and on Map 4 attached thereto. Cram interpreted it to mean the "best" ship channel. It is significant that Cram paid little or no attention to the word "centre." Had his duty consisted in locating the line of shipping, would not that have been his principal consideration, rather than the location of the straits which comprised the "best ship channel?"

The title to Map 4 attached to Cram's report, states that the map exhibits the various "ship channels;" the context of his report concerns itself with the difficulty over the location of the principal or "best ship channel," but at no point with the location of the centre thereof. While it was Cram's purpose to locate, ascertain and survey the boundary, yet he concerned himself only with the straits

[18]Wisconsin Exhibit 38, Record p. 99-118.

through which the ship channels passed. Obviously, he, and his superior officers, had in mind, that the channel being established, the centre thereof would be the geographical center. Col. Martin testified that the ship channels exhibited on Cram's map were much like the Wisconsin boundary contention and bears no resemblance to that of Michigan.[19]

Douglas Houghton, Michigan State Geologist, in 1839 stated that between Louse Island (Rock Island) and St. Martins Island is the principal "ship channel" to Green Bay.[20]

2. Expert Testimony

Colonel Lawrence Martin testified that the words "ship channel" as used in the Michigan Enabling Act of 1836, in his opinion, referred to the "kind of passage in a lake or arm of the sea, for which the word 'channel,' 'straits,' 'roads' and such words are used." That it has no relation to the matter of a charted shipping course, except that charted shipping courses go through shipping channels.[21]

Colonel Martin, further testified that various exhibits in the record using the word "channel" and particularly the report of Captain Cram, were in accord with his views as to the definition of the word "channel."[22]

In support of his construction, Col. Martin pointed out all of the "ship channels" shown on the chart of Green

[19]Testimony Col. Lawrence Martin, Record p. 72.
[20]Testimony Col. Lawrence Martin, Record p. 76.
[21]Testimony Col. Lawrence Martin, Record p. 74.
[22]Testimony Col. Lawrence Martin, Record p. 75-77.

Bay to-wit, the Poverty Island Passage, St. Martins Island Passage, the Rock Island Passage, the Detroit Passage, and the Porte des Morts Passage; that in the vicinity of Chambers Island there is a channel called Strawberry channel; that east of Chambers Island is a channel without name, eastermost of the two southwesterly channels of Cram's map, and that west of Chambers Island and east of Menominee County, Michigan, is a broad strait, which is a ship channel.[23]

Interpretation of "Channel" in Establishment of Other Boundaries.

Colonel Lawrence Martin testified that he had studied other boundary disputes, some of which involves the establishment of a boundary in straits, inland seas or bays and that he had never heard of a line being established therein, similar to that of the red line on Combined Exhibit 1 (Michigan's boundary proposal).

Witness Martin further testified that he was familiar with the establishment of a boundary through straits, inland seas or landlocked bays similar to that represented by the blue line on Combined Exhibit 1 (Wisconsin's boundary proposal), notably the case of Wisconsin v. Minnesota. The boundary description of Wisconsin after proceeding through Lake Superior to the mouth of the St. Louis river reads:

> "Thence up the main channel of said river to the first rapids in the same * * * *."[24]

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[23]Testimony Col. Lawrence Martin, Record p. 77-84.

[24]Chap. 56, 9 U. S. Stat. at L. 233.

The boundary as finally fixed by the Supreme Court Commissioners in this area proceeded through the middle or centre of the general geographic medial line of broad seas.

Middle of Channel Interpreted by Wisconsin Enabling Act.

Fortunately we have in the instant case the interpretation of the meaning of the word "channel." In the Michigan Enabling Act of June 15, 1836,[25] under which Michigan became a state in 1837, the boundary is described to run

> "* * * * through the middle of the main channel of the river Montreal to the middle of the Lake of the Desert; thence * * * *."

In the Wisconsin Enabling Act of August 6, 1846,[26] in the same area the line is described as

> "* * * * thence along, the southern shore of Lake Brule in a direct line to the centre of the channel between Middle and South Islands, in the Lake of the Desert; thence * * * *"

As was said in the case of Michigan v. Wisconsin,[27] the inference is pretty clear that the change of description was made in the Wisconsin Enabling Act, as a part of the general readjustment of the boundary. We contend that the Wisconsin Enabling Act not only was a readjustment of the boundary, but furnishes a definition of what Congress meant by the "centre of the channel." Not only in the in-

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[25] 5 U. S. Stats. at L. page 49.
[26] 9 U. S. Stats. at L. page 7.
[27] 270 U. S. 295; 46 Sup. Ct. Rep. 290.

stant case, but in the case between the States of Wisconsin and Michigan in 1923, the "centre of the channel" between Middle and South Islands in the Lake of the Desert has always been considered, the geographical center of that channel.

To hold that Congress meant the geographical centre in that instance and not in the Green Bay area, would be inconsistent.

The fact remains that sailing courses first appeared on 1863-64 charts and the boundary was legislated into being in 1836.[28]

The United States Lake Survey has from time to time changed the location of such sailing courses on subsequent map publications, so that the courses of 1864 do not agree with the courses upon modern maps.[29] It may be true that modern navigation is simpler and more easily pursued by following charted sailing courses. That does not alter the fact that Congress established the boundary in 1836, when such facilities were not available, and did not become available for almost thirty years.

The Geographical Center as a Boundary

The Special Master concluded that if Congress had in mind the "channel" in the body of Green Bay, the geographical center rule was the proper rule to apply in establishing the boundary.[30]

His second recommendation for a decree in this area, follows this rule.[31]

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[28]Testimony Col. Lawrence Martin, Record, pp. 66.
[29]Testimony Col. Lawrence Martin, Record, p. 66.
[30]Master's Report, page 37.
[31]Master's Report, page 45.

In order to avoid confusion, we wish to point out that we do not contend that the "channel" referred to in the Congressional Acts establishing the boundary refers *only* to the channel in the body of Green Bay, but to the channel, from the mouth of the Menominee River northward and then easterly through the Rock Island Passage; that is, the body of Green Bay and the entrance thereof.

The Thalweg Rule

A general rule for the determination of boundaries in navigable rivers is known as the thalweg rule. It is well stated in 1 *Moore's International Digest*, pp. 616:

> "Where a navigable river forms the boundary of conterminous states, the middle of the channel, the filum aquae, or thalweg—is generally taken as the line of their separation, the presumption of law being that the right of navigation is common to them both."

The reason for the thalweg rule as described in many authorities, is to afford to the states on either side of a navigable stream, equal access to the lines of commerce. It appears to be uniformly accepted among the nations of the world, as the correct rule applicable to all rivers and bodies of water, wherein there exists an unequal opportunity for navigation in all directions, in the body of water invoved. As was said in *Minnesota v. Wisconsin*, 252 U. S. 272,

> "The doctrine of thalweg, a modification of the more ancient principle which required equal division of territory was adopted in order to preserve to each state equality of rights in the beneficial use of the

stream as a means of communication. Accordingly, the middle of the principal channel of navigation is commonly accepted as the boundary."

Oppenheim[32] says that the thalweg is resorted to in navigable rivers. This is for the apparent purpose of preserving to each state equal rights of navigation in the stream. Where no navigable rights exist at all, the middle of the river is by all authorities taken as the boundary.

It is said in Westlake's International Law,[33]

"When a river forms the boundary between two states, it is usual to say that the true line of demarcation is the thalweg, a german word meaning literally the 'downway.' That is, the course taken by boats going down stream which is again that of the strongest current, the slack current being left for the convenience of the ascending boats. It is said that the thalweg was first proposed for this purpose at the Congress of Raskalt. The older authorities have generally taken the middle line of the river as the true boundary, in obedience to the rule of Roman law for the delimitation of properties."

It is only on the principle of the thalweg, which, as we have pointed out, applies only to navigable streams, that the Michigan boundary proposal can be supported.

We do not take issue with the thalweg rule. It is the firmly established rule in river boundaries in the absence of treaties, in this country, but we do contend that the same is not applicable in this case for the reason—

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[32]4th Edition, Vol. 1, Section 199.
[33]Vol. I, page 144.

First: Congress did not intend the rule of the thalweg to apply inasmuch as they specifically designated "the centre of the most usual ship channel."

Second: None of the authorities apply the thalweg rule in areas such as the Green Bay waters where practically the whole body of water is suitable for navigation. There is in the Great Lakes and in the Green Bay waters no thread of the stream.

> "The underlying rationale of the doctrine of the Thalweg is one of equality and justice * * * If the dividing line were to be placed in the centre of the stream rather than in the centre of the channel, the whole track of navigation might be thrown within the territory of one state to the exclusion of the other."
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> *New Jersey v. Delaware,* (October Term, 1933) 291 U. S. 361.

In that case, the evidence disclosed a well-defined channel of navigation up and down Delaware River and Bay in which the current of water attains its maximum velocity, and that the one channel must be adhered to for safety in navigation.

Applicability of Geographical Center Rule

We have pointed out that the geographical center rule was the rule, that Captain Cram thought applied to the waters of Green Bay and that the same rule has been adopted as the interpretation of the words "center of the channel," in the portion of the boundary between Michigan and Wisconsin, lying between Middle and South Islands in the Lake of the Desert.

In the case of *Iowa v. Illinois*,[34] the issue involved the location of the state boundary in the Mississippi River, and following the authorities as to boundaries in navigable rivers, the rule of the thalweg was applied.

Subsequently, the case of *Louisiana v. Mississippi* arose.[35] The portion of the boundary in dispute between these states was from the mouth of the Pearl River to the Gulf of Mexico, and was occasioned largely by reason of valuable oyster beds in the intervening waters. The waters of Lake Borgne and Mississippi Sound, through which the boundary was finally drawn, are comparatively shallow, and the water areas between banks considerable narrower than in this case. In referring to the case of *Iowa v. Illinois* (supra) the court said, on page 50:

> "This judgment related to navigable rivers—but we are of opinion that, on occasion, the principle of the thalweg is applicable, in respect of water boundaries to sounds, bays, straits, gulfs, estuaries and other arms of the sea.
>
> "As to boundary lakes and landlocked seas, where there is no necessary track of navigation, the line of demarcation is drawn in the middle, and this is true of narrow straits separating the lands of two different states; but whenever there is a deep water sailing channel therein, it is thought by the publicists that the rule of the thalweg applies."
>
> (citing)
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> 1 *Martens* (F. de) 2nd ed. 134;
> *Hall* Sec. 38;
> *Bluntschli*, 5th ed. Sec. 298, 299;
> 1 *Openheim*, 254, 255.

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[34]147 U. S. 1.
[35]202 U. S. 1.

In *W. E. Hall's International Law*, 6th Edition, page 123, it is said:

> "Where a boundary follows a river, and it is not proved that either of the riparian states possesses a good title to the whole bed, their territories are separated by a line running down the middle, except where the stream is navigable, in which case the centre of the deepest channel, or as it is usually called, the thalweg, is taken as the boundary. In lakes, there being no necessary track of navigation, the line of demarcation is drawn in the middle."

Azurn's Maritime Law, page 225, states that if different nations possess land on the shore of a strait or gulf, the empire of each must extend to the middle of the water, at an equal distance from every part of their respective shores.

Oppenheim says:[36] If a boundary runs through a river the middle of the river is chosen, unless the river is navigable, when the thalweg becomes the boundary. If there are lakes and landlocked seas along the route of the boundary, the line runs through the middle. If a narrow straits divides the land of two different states, it belongs to the territory of both, and the boundary line runs, in default of special treaty, through the mid-channel.

In order to apply the rule of the thalweg, there must be a filum aquae, the thread of the stream, which, according to the authorities, is the course followed by the strongest current, of a river, in the deepest channel thereof, and therefore, the course naturally followed by ships in sailing upon the river. This rule of the thalweg, as we have stated, is based upon the proposition that each state must be

[36]Oppenheim Vol. I, Fourth ed. Sections 199 and 194.

given equal rights of navigation, and, where there is only one necessary track of commerce; to place the line otherwise than in the center thereof, deprives one state of equal rights of navigation therein.

An examination of the cases decided by the Supreme Court of the United States, shows that the thalweg rule as a boundary between states, has not been applied to inland lakes, or straits, except in those limited classes of cases where it appears that there was a well defined channel, which constituted a necessary track of navigation.

The situation in Upper St Louis Bay in the case of *Minnesota v. Wisconsin,* is similar to this case.[37] The boundary was governed by the words of the Wisconsin Enabling Act[38] which read:

> (From the mouth of the St. Louis River) "thence up the main channel of said river to the first rapids in the same * * * *."

From the entrance of the St. Louis River into Lake Superior, going upstream, one first encountered deep Superior Bay, then Lower St. Louis Bay, and then Upper St. Louis Bay. The latter had a depth of eight feet throughout most of said bay, as did also Lower St. Louis Bay. In Upper St. Louis Bay, however, a curving channel of fifteen feet existed, except at a bar, where it was eight to ten feet, said deeper channel being very close to the Minnesota bank of this bay. The court said there was no current, except that it varied with the wind.

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[37] Minnesota v. Wisconsin, 252 U. S. 273.
[38] 9 U. S. Stat. at L., 233.

The court said:

"For many years subsequent to 1848 there were no vessels with eight foot draft upon these waters; and probably none of such size regularly plied there until 1890 or later.

"Manifestly, from the description heretofore given, the waters between Big Island and Lake Superior (Big Island is located at upper end of Upper St. Louis Bay) were broad sheets without any definite uninterrupted deep channel extending throughout their entire length. Also, there was no steady controlling current. Such vessels as plied there in 1846 and long thereafter moved with freedom in different directions.

"When a navigable river constitutes the boundary between two independent states, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each state in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. Thus the jurisdiction of each state extends to the thread of the stream, that is, to the mid-channel, and, if there be several channels, to the middle of the principal one.

"As to boundary lakes and landlocked seas, where there is no necessary track of navigation, the line of demarcation is drawn in the middle, and this is true of narrow straits separating the lands of two different states."

(citing) *Louisiana v. Mississippi*, 202 U. S. 1.

On page 283 of said decision the court said further:

"The doctrine of thalweg, a modification of the more ancient principle which required equal division

> of territory, was adopted in order to preserve to each state equality of rights in the beneficial use of the stream as a means of communication. Accordingly, the middle of the principle channel of navigation is commonly accepted as the boundary. Equality in the beneficial use often would be defeated, rather than promoted, by fixing the boundary on a given line, merely because it connects points of greatest depth. Deepest water and the principal navigable channel are not necessarily the same."

The Court by its decision in this case refused to follow the deep water channel near the Minnesota shore, because,

> "under such circumstances Minnesota would be deprived of equality of rights, both in navigation and to the surface, if the boundary line were drawn near its shore."

Yet, in the instant case, the Michigan proposed boundary would draw the line separating the states, where it would not give equality either in navigation or as to the surface.

All of the ports on the eastern side of Green Bay, at the foot of the bay, and up the western side of the bay to the Menominee River, are in the State of Wisconsin. The only Michigan port of consequence not in the upper part of the bay is Menominee. Chambers Island, Washington and Rock Island are a part of the Wisconsin coast, just as St. Martin's Island is a part of the Michigan coast. The term "coasts" includes islands or natural appendages which rise out of the water.

Wheaton's International Law, Fifth Ed. pp. 284

Michigan has two exclusive ship channels north of the principal ship channel, to-wit, St. Martin's passage and Poverty Island passage. Wisconsin has one exclusive

channel south of the principal ship channel, to-wit, Porte des Morts, and the dredged canal at Sturgeon Bay.

Equality of rights, both those of navigation and of the surface, demand that the boundary be the geographical center line. The principal occupation of residents of Washington Island is fishing. Yet, Michigan would place the boundary upon their very doorsteps, for no other reason than the fact that a modern steamship course passes in this location. To the west of the Whalesback appears a ship course more nearly dividing the waters, and every bit as navigable as the one chosen by the defendant.

There is no Necessary Track of Navigation in Green Bay

No argument is necessary to support the proposition that there is no necessary track of navigation in Green Bay. We have in evidence many charts of this area beginning with the first soundings thereof in 1845[39] to the more modern charts published in the past few years. There is not a chart in evidence since sailing courses were established in 1863 that do not show a network of shipping courses all over the bay. All of these charts show depths of water sufficient for navigation almost anywhere with the exception of a few shoals.

There is no Filum Aquae in Green Bay

There is no evidence in this case that the line representing the boundary proposal of the State of Michigan is the filum aquae or thalweg. No thread of the stream

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[39]Congressional Globe, Vol. 15, First Session, 29th Congress.

has been shown to exist by any evidence and it is plain that Green Bay is a body of water navigable throughout and should be governed by the same rules as that applying to other large inland seas such as the great lakes. It is in fact an arm of the inland sea known as Lake Michigan.

The Rules of Fauces Terrae

It may be argued that to adopt a geographical center line as the center of the channel produces a zigzag line due to the indentations of the sides of the channel. We contend, however, that the sides of the channel are to be treated as a straight line across indentations under the rule of fauces terrae (jaws of the land). Fauces terrae are defined in *Black's Law Dictionary* as narrow headlands and promontories in enclosing a portion or arm of the sea within them.

1 *Kent Comm.* 367;
Hale, DeJure Mar. 10;
1 *Story* 251, 259.

Bouviers' Law Dictionary recites that projecting headlands or promontories including arms of the sea are said to be inclosed within the fauces terrae in contradiction to the open sea and it is said,

> "The open ocean which washes the sea coast is used in contradiction to arms of the sea inclosed within the *fauces terrae,* or narrow headlands and promontories, bays and where the tide ebbs and flows. They are within the admiralty and maritime jurisdiction of the United States; but if they are within the body of a county of any particular state, the state jurisdicion attaches."

1 *Kent. Comm.* 367.

"It ought at least, to be insisted that the extent of the neutral immunity should correspond with the claims maintained by Great Britain around her territory, and that no belligerent right should be exercised within 'the chambers formed by headlands, or anywhere at sea within the distance of four leagues, or from a right line from one headland to another.'" (Mr. Madison's Letter to Messrs. Monroe & Pinckney, dated May 17, 1806.)

1 *Kent.* 31.

"Creeks, havens, coves and inlets lying within projecting headlands and islands and all bays and arms of the sea lying between and within lands not so wide but that persons and objects on the one side can be discerned by the naked eye by persons on the opposite side are to be taken to be within the body of the county."

U. S. v. Grush, 5 Mason 390;
Commonwealth v. Peters, 12 Met. 387.

In the *Albany Law Journal,* Vol. 32 page 484, it is stated quoting from *Wheaton on International Law,* page 255:

"The maritime territory of every state extends to the ports, harbors, bays, mouths of rivers and adjacent parts of the sea, inclosed by headlands, belonging to the same state. The usuage of nations superadds to the extent of territorial jurisdiction a distance of a marine league, or as far as a cannon shot will reach from shore, along the coasts of the state."

And it is said in *Halleck on Int. Law,* page 171:

"The cognizance of offenses committed on the high seas had been left to the jurisdiction of the admiral. Every offense was triable only in the county in which it had been committed. If an offense was committed in a bay or gulf, *inter fauces terrae*, the common law could deal with it, because the parts of the sea so circumstanced were held to be with the body of the adjacent county or counties; but along the coast, on the external sea the jurisdiction of the common law extended no further than to low-water mark."

Farnham on Water and Water Rights, page 25, says:

"A bay lying within the boundaries of a country is a part of it."

And it is said in *Westlake on Int. Law*, Part I, page 187:

"As to bays, if the entrance to one of them is not more than twice the width of the littoral sea enjoyed by the country in question—that is, not more than six sea miles in the ordinary case, eight in that of Norway, and so forth—there is no access from the open sea to the bay except through the territorial waters of that country, and the inner part of the bay will belong to that country no matter how widely it may expand. The line drawn from shore to shore at the part where, in approaching from the open sea, the width first contracts to that mentioned, will take the place of the line of low water and the littoral sea belonging to the state will be measured outwards from that line to the distance, three miles or more, proper to the state."

In *Mahler v. Transportation Company*, 35 N. Y. 352 at 355, it was said that the islands in the eastern extremity of Long Island Sound are the "fauces terrae" which define the limits of territorial authority and mark the line of separation between the open ocean and the inland sea.

To an extent this principle was recognized in *Lumber Compay v. Peters*, 87 Mich. 498, where two lumber companies owned lands within a cove or bay on the West shore of Green Bay in Menominee County, Michigan. Each desired to construct docks at right angles to the shore line which ultimately would intersect and interfere with one another. In defining the division line in the waters of the bay the court held that the principle should be followed of drawing a line across the cove or bay between headlands and giving to each riparian owner so much space on said line as he owns of the shore line.

The same principle was applied to the Bay of Monterey which had headlands approximately eighteen miles apart and a maximum width of twenty-two miles, where it was said that the bay within was wholly included within the boundaries of California.

Ocean Industries Inc. of Santa Cruz v. County Super. Ct., 200 Cal. 235, 252 Pac. 722.

A similar principle was applied to Buzzards Bay which is more than one but less than two leagues across between the headlands and was inclosed wholly within land forming a part of the State of Massachusetts. It was said to be within the boundary of that state.

Manchester v. Mass., 139 U. S. 234, 11 S. C. R. 559, 35 Law Ed. 159 (Affirming 152 Mass. 230, 25 N. E. 113).

The boundaries of a state on general principles of international law include waters within a certain distance of its coast. This rule has been held to apply not only to the mainland of a state but to islands forming a part of it.

Ex P. Marincovich, 48 Cal. App. 474, 192 Pac. 156.

We therefore hold, that the Special Master, properly found that there was no usual course of navigation in 1836, that the "main" or "most usual ship" channel consists of the area lying between Chambers Island and the west shore and the body of the bay itself, as well as the Rock Island passage, and that the correct rule applicable is the geographical center rule.

We contend that it was impossible for Congress in 1836 to anticipate a course of shipping that would be established on the charts in 1863 as a boundary, and which course of shipping does not exactly coincide with the modern course that defendant asks the court to adopt as a boundary. Congress did not perform a continuing act; it established a definite line on June 15, 1836. Clearly Congress did not fix upon a course of shipping as a boundary, when none existed until almost thirty years later.

THE MASTER'S CONSTRUCTION OF CONGRESSIONAL ACTS

Both parties to this action have assumed throughout that the "main channel" referred to in the Wisconsin Territorial Act,[40] and the "most usual ship channel" referred to in the Michigan Enabling Act,[41] applied to a channel that extended lengthwise of Green Bay approximately north and south. This assumption seems also to have been accepted by this court in its decision in 1926.[42]

The Special Master concluded that he could not accept this premise as correct and undertook to apply the description of the Congressional Acts in such a manner as he deemed proper. Congress, concluded the Master, "merely undertook to draw a boundary line from 'a point in the middle of Lake Michigan' to the mouth of the Menminee River, or in the reverse order, from the mouth of the Menominee River into Lake Michigan."[43]

The Special Master found that no living witnesses were available as to where the center of the most usual ship channel or the main channel of Green Bay was in 1836, that there was no such thing as a charted sailing course, or any well-recognized or defined ship channel in the waters of Green Bay in 1836.[44]

In construing the intent of Congress as expressed in 1836, it must be considered that Congress would have no evidence whatever of "sailing courses" or soundings in Green Bay, and was dealing with two bodies of wide and open water, namely, Lake Michigan and Green Bay, said

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[40]Chap. 54, 5 U. S. Stat. at L. 10, 11.
[41]Chap. 99, 5 U. S. Stat. at L. 49.
[42]Report of the Master, page 38.
[43]Report of Master, page 39.
[44]Report of Master, page 31.

the Master.[45] Both bodies of water were uncharted, they were wide and unobstructed and traversed largely by sailing vessels that, traveled no certain courses and were compelled to "tack" as the wind required. These two bodies of water were separated from each other by a series of islands running between the northern end of the Door peninsula and the Michigan mainland, creating at least five passages or channels.[46]

In commenting upon the Congressional Acts of 1836, the Master concluded that the words of the Wisconsin Territorial Act,[47] which was passed first, namely

> "through the middle of Lake Michigan, *to a point in the middle of said lake and opposite the main* channel of Green Bay,"

would become an absurdity unless the point in the center of Lake Michigan were applied to a channel between the islands at the entrance to the bay, because the bay itself ran north and south, and it would be impossible to fix a point opposite the channel of such a bay.[48]

> "Nothing whatever," said the Master, "is said about a channel to be followed in Green Bay after the line passed through the channel opposite the point in Lake Michigan."[49]

This position is fortified, the Master concluded, because the words of the Wisconsin Territorial Act[50] provided:

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[45]Report, page 39.
[46]Master's Report, page 39.
[47]5 Stat. at L. 10, 11.
[48]Report of the Master, page 40.
[49]Report of the Master, page 41.
[50]5 Stat. at L. 10, 11.

> "* * * * and through said channel (the main channel of Green Bay) and Green Bay to the mouth of the Menominee River."

and unless this position is adopted the words "and Green Bay" become meaningless.[51]

The Master concluded that the Michigan Enabling Act, passed approximately two months later, was intended by Congress to contain an identical description of the boundary prescribed by the Wisconsin Territorial Act in this area, and that it can be reconciled with his conclusions above set forth, by applying its terms:

> "* * * thence down the centre of the main channel of the same (Menominee River) to the centre of the most usual ship channel of the Green Bay of Lake Michigan; thence through the centre of the most usual ship channel of the said bay to the middle of Lake Michigan." (5 Stat. at L. 49)

so that the line passes from the mouth of the Menominee River to the center of this main or most usual channel leading from Green Bay into Lake Michigan, then through the center of said ship channel to the middle of Lake Michigan. Such a line, concluded the Master, is consistent with the description in both acts, is consistent with the known conditions as to the island channels, is consistent with the fact that no definite course was followed by vessels in Green Bay proper, and it apparently was Congress' intention to draw a boundary line from the point in Lake Michigan, opposite the main or most usual island channel leading into Green Bay, thence through the center of such channel into

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[51] Master's Report, page 41.

Green Bay, and thence by the most direct and navigable route to the mouth of the Menominee river.[52]

Certain letters of Lucius Lyon, a former delegate from the territory of Michigan, and senator-elect from the prospective state, were set forth in the Master's Report as corroborative of this construction.[53]

MASTER'S RECOMMENDATION BASED ON SUCH CONSTRUCTION

The Master's recommendations for a decree in the Green Bay section was based upon the conclusions aforesaid. While recommendations were made in the alternative, his first recommendation for a decree was based on this construction of the location of the "main channel" or "most usual ship channel". His recommendation provided:

> "If the court accepts the Master's conclusion to the general effect that the channel referred to in the Acts of Congress is one between the islands that separate Green Bay and Lake Michigan, then the boundary line should be drawn from a point in the middle of Lake Michigan opposite the center of the Rock Island passage, thence in a general westerly direction through the center of said passage, and thence in a course capable of navigation by the most direct route to the mouth of the Menominee river."

Directions for following this line upon the map attached to the report then follow.[54]

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[52]Report of the Master, page 42.
[53]Master's Report, pages 43 and 44.
[54]Master's Report, pages 44 and 45.

EXCEPTION OF THE PARTIES TO MASTER'S CONSTRUCTION OF CONGRESSIONAL ACTS

By the State of Wisconsin

Plaintiff excepted to the Master's conclusions interpreting the Congressional Acts with reference to the location of said main or most usual ship channel in the following particulars:

(1) That the assumption of counsel that the channel referred to was one in the body of Green Bay proper, was incorrect;[55]

(2) That it is impossible to locate a point in the center of Lake Michigan opposite such a channel, unless the Master's construction thereof is adopted;[56]

(3) That this "main channel" or "most usual ship channel" was the channel between the islands at the entrance to the Green Bay;[57]

(4) That any other construction rendered the words of Wisconsin Territorial Act "and Green Bay" meaningless;[58]

(5) That Congress never meant to refer to a "main channel" in the body of Green Bay, by the language of the Wisconsin Act.[59]

(6) That a proper construction of the Michigan Enabling Act describes a line from the mouth of the Menomi-

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[55]Plaintiff's Exception 11, page 4.
[56]Plaintiff's Exception 12, page 4.
[57]Plaintiff's Exception 13, page 5.
[58]Plaintiff's Exception 15, page 5.
[59]Plaintiff's Exception 16, page 5.

nee river by the most direct and navigable route to the center of said channel between the islands;[60]

(7) That Congress intended to draw a boundary line from a point in the middle of Lake Michigan, opposite the main or most usual island channel leading into Green Bay, through the center of such channel into Green Bay, and thence by the most direct and navigable route to the mouth of the Menominee River;[61]

(8) That the evidence in the record corroborates this construction;[62]

(9) That Lucius Lyon, senator-elect from the proposed State of Michigan, clearly understood that the channel referred to was the main island channel at the Bay's entrance,[63] and that Congress meant to refer to the main one of the island channels at the entrance to Green Bay, and not in Green Bay proper.[64]

Plaintiff further excepted to the first alternative recommendation of the Master for a decree hereinbefore set forth.[65]

By the State of Michigan

Defendant excepted to the Master's Construction of Congressional Acts, in toto,[66] and to both alternative recommendations of the Special Master, as to the Green Bay section, in toto.[67]

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[60]Plaintiff's Exception 18, page 6.
[61]Plaintiff's Exception 20, pages 6 and 7.
[62]Plaintiff's Exception 22, page 7.
[63]Plaintiff's Exception 23, pages 7 and 8.
[64]Plaintiff's Exception 24, page 8.
[65]Plaintiff's Exception 25, pages 8 and 9.
[66]Defendant's Ninth Exception, page 12.
[67]Defendant's Tenth Exception, page 13.

THE MASTER ERRED IN HIS CONSTRUCTION OF CONGRESSIONAL ACTS

The Michigan Enabling Act Is the Effective Act

Among other things, the Special Master rested his conclusion that the Congressional Acts referred to a channel at the entrance to Green Bay only, upon the significance attached to the fact that the Wisconsin Terrotorial Act was first passed. The Wisconsin Territorial Act was passed on the 20th day of April, 1836.[68] The Michigan Enabling Act became law on the 15th day of June, 1836.[69] The Michigan Enabling Act, however, although passed subsequent to the Wisconsin Territorial Act, passed the Senate on April 2, 1836.[70] We agree that Congress intended the same line to be described by the language in both acts. In any event, the second act of Congress, the Michigan Enabling Act, is the effective act, and the line there is described as from the mouth of the Menominee River "to the centre of the most usual ship channel of the Green Bay of Lake Michigan".

A Point Opposite a Curving Channel Is Not an Absurdity

The Master holds that it would absurd to locate a point opposite a main channel such as Green Bay that ran north and south lengthwise of Green Bay some 70 or more miles. We are unable to see anything absurd about locating a point opposite the open end of a curving ship channel which runs first northeasterly and then easterly. We

[68]5 U. S. Statutes at Large 10.
[69]5 U. S. Statutes at Large 49.
[70]Wisconsin Exhibit 59.

must bear in mind that the channel lies not only between Chambers Island and the west shore of the entire body of the Bay itself, but also the entrance to the Bay.

Captain Cram's Report

Captain Cram's report of 1840[71] refers to the necessity of making "a complete hydrographic survey of all the channels that exist in the portion of Green Bay east of the mouth of the Menominee River." His report shows conclusively that he was attempting to locate channels within Green Bay itself as well as to the entrance of the Bay. This was only four years after the boundary had been established. His judgment was so respected by Congress that he was specifically named by that body in the Wisconsin Enabling Act of 1846 when his proposal for division of islands was incorporated in that act.[72]

Map No. 4, attached to said report of Captain Cram,[73] indicates the positions of two channels within the body of the Bay as well as to the entrance to the Bay. Those portrayed in the entrance to the Bay extend into the Bay itself for a considerable distance beyond the entrance.

Obviously, Cram construed the Congressional Acts creating the boundary as referring to a channel within Green Bay itself, as well as at the entrance thereto.

Other Boundary Bills

While the Michigan Enabling Act was pending, it having been introduced in the Senate as S177, a similar bill was pending in the House of Representatives. It never

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[71] Wisconsin Exhibit 38, Record p. 99-118.
[72] 9 U. S. Statutes at Large 233.
[73] Wisconsin Exhibit 38, Record p. 99.

became a law for the reason that the contemporaneous Senate Bill served the same purpose and was enacted. The bill introduced in the House was known as House Resolution No. 382 entitled "A Bill to Establish the Northern Boundary Line of the State of Ohio, and to Provide for the Admission of the State of Michigan into the Union." This bill contained the following boundary description.

> "* * * and through the middle of the same (the main channel of the Menominee River) to the middle of Green Bay; thence through the middle of the main channel of Green Bay, to the middle of Lake Michigan."[74]

It would indicate that Congress intended to refer to a channel in the body of Green Bay, and that they considered "the middle of Green Bay" and the "middle of the main channel of Green Bay," as synonomous.

Subsequent Attempted Legislation

The history of attempted legislation to clarify the boundary after Cram's first report is not in accord with the Master's construction that Congress referred to a channel at the entrance of Green Bay only. Three bills were introduced in three successive sessions of Congress subsequent to the creation of the boundary in 1836 and subsequent to Cram's report calling attention to the need for clarity. These are respectively, (1) S. 9 in the 27th Congress, 3rd Session, (2) S. 6 in the 28th Congress, 1st Session, and (3) House resolution 470 in the 28th Congress, 2nd Session. Each bill was introduced by a Senator or Representative from the State of Michigan. The first two

[74]House Report No. 380, 24th Congress, 1st Session, page 16.

bills named were approved without amendment by the Committees on the Judiciary or on Territories of both houses. The first two bills named passed the Senate and each of the three bills was an amendment to one of the acts of 1836.

The history of these bills appears in the record pages 118-122. They were amendatory acts to the Michigan Enabling Act, and attempted to clarify the same with respect to the "channel" in Green Bay, and attempted to meet the difficulties pointed out in Cram's Report.

The use of the words "western channel" in these acts shows that Senator Porter of Michigan considered in 1842 that there was a channel extending lengthwise of Green Bay in a north and south direction, and that in 1836 Congress intended it to be followed. These views as appears from the history of these bills, were held by (a) a Michigan Senator in December, 1842, (b) a Michigan Senator in December, 1843, (c) a Michigan Representative in December, 1844, (d) the Senate Judiciary Committee in January, 1843, (e) the Senate itself in February, 1843, (f) the House Committee on Territories in March, 1843, (g) the Senate Judiciary Committee in January, 1844, (h) the Senate itself in March, 1844, and (i) the House Committee on Judiciary in April, 1844. Undoubtedly Congress contained many members who had taken part in the enactment of Michigan Enabling Act in 1836.

We contend that they are more apposite than the two letters of a former delegate of the Michigan territory which the Special Master quotes on page 43 of his report, particularly in view of the fact that Lyons' letters do not address themselves specifically to the point at issue.

Michigan v. Wisconsin 1923-26

In 1926 this court said in its opinion with reference to the Green Bay section that there were two distinct ship channels to either of which the description in the Enabling Act might apply. This court then proceeded to outline in detail the Michigan boundary proposal in Green Bay, and detailed the contention of Wisconsin that the channel after leaving the mouth of the Menominee, turns to the north and pursues a northerly direction to a point opposite the Rock Island passage; thence through the Rock Island passage into Lake Michigan.[78]

These are, of course, rather general terms, and upon the court's conclusion that the Wisconsin proposal be adopted, it held in effect that the line passed through the channel between Chamber's Island and the mainland proceeded in a northerly direction and passed through the Rock Island passage into Lake Michigan.

This court was clearly of the opinion that the Congressional Acts referred to a channel in the body of Green Bay as well as at the entrance thereof.

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[78]Michigan v. Wisconsin, 270 U. S. 295, at 315.

THE MASTER ERRED IN NOT APPLYING THE PROPER RULE OF LAW IN DESCRIBING THE BOUNDARY IN GREEN BAY

For the purposes of the discussion, Plaintiff is assuming that the Master correctly interpreted the Congressional Acts, in concluding that in both the Wisconsin Territorial Act and the Michigan Enabling Act, Congress in using the words "main channel" and "most usual ship chan-

nel" referred only to the channel between the islands at the entrance to the bay. The Master thrice asserts in this part of his report, that Congress did not attempt to define the boundary in the body of Green Bay proper.

> "Nothing whatever is said about a channel to be followed *in* Green Bay after the line passed through the channel opposite the point in Lake Michigan."[76]
>
> "I cannot escape the conclusion that Congress never meant to refer to a 'main channel' in the *body* of Green Bay, by the language of the Wisconsin Act."[77]
>
> "Neither act (referring to the Wisconsin Territorial Act and the Michigan Enabling Act) attempted to describe any channel in the body of Green Bay between the mouth of the Menominee river and the 'main channel' between the islands."[78]

He then concludes that Congress intended said boundary line to proceed after passing into Green Bay, through the center of this most usual or main channel, *by the most direct and navigable route to the mouth of the Menominee river.*"[79]

The Master's recommendations for a decree embodies the same words.[80]

Clearly under the Master's conclusions as to the location of the channel, neither act contains any words describing the course of the boundary in the body of Green Bay. This was left entirely undescribed and undefined.

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*Italics Ours.

[76]Master's Report, page 41.

[77]Master's Report, page 41.

[78]Master's Report, page 42.

[79]Master's Report, page 42.

[80]Master's Report, pages 44 and 45.

We find no rule of law stated, or cited, to support the describing of this line between the mouth of the Menominee river and the center of the island channel at the entrance to the bay, *by the most direct and navigable route to the mouth of the Menominee river.*

It is true that this possible construction of the Congressional Acts did not come to the attenion of counsel for either state, and no part of the briefs of the parties or their arguments before the Master dealt with the rule of law applicable to describing the line in the body of Green Bay, under this construction.

Captain Cram construed the intention of Congress in 1840, four years after the passage of said acts, his construction being embodied on Map No. 4, attached to his report.[81] This construction cannot be reconciled with "the most direct and navigable route."

The Geographical Center Rule

Plaintiff contends that if the master's construction is correct, and that the boundary in the body of Green Bay is undefined, the proper rule of law applicable to its location is the geographical center rule. There is no thalweg or filum aquae in the bay. Every chart in evidence, exhibiting soundings, shows that Green Bay is navigable throughout, except for shoal water near the shores. The rule applicable thereto is the same as in the other large inland seas, such as the Great Lakes. This bay is in fact an arm of the inland sea, Lake Michigan. The application of this rule gives to each state equality of navigation and of the surface.

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[81] Wis. Ehibit 38, Record p. 99.

As a matter of fact the Master recognized the geographical center rule as the proper rule of law applicable, under the construction that the channel referred to by Congress was within the body of the bay. The Master cites and quotes at length from various authorities, as to the applicability of the geographical center rule in a water area of this kind, following his findings that if any such thing as a "most usual ship channel" in the body of Green Bay existed in 1836, its true location cannot now be ascertained and the same cannot now be definitely established.

Under this alternative construction, that the channel referred to was in Green Bay proper as well as at the entrance to the bay, after finding that the channel either did not exist, or if it did ,it cannot now be ascertained, the geographical center rule was applied by the Master to fill the void.[82]

We contend that under the Master's own construction, which left the boundary in the body of the bay undefined, or simply provided that the line shall pass from one terminus to the other, the proper rule of law applicable to trace and describe the same where its course is undefined, is the geographical center rule, approved by the Master under the other construction.

It can serve no useful purpose to rediscuss the geographical center rule at this point, or its applicability. We have fully and exhaustively set forth the law respecting the same, and its applicability in this case in the preceding pages.[83] The Master devoted considerable space in his report to a discussion of this rule.[84] He concluded that it was

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[82]Master's Report, page 37.

[83]See Plaintiff's Brief, page 111-117.

[84]Master's Report, pages 34 to 37 inclusive.

a proper rule to apply, if the proper construction of the Congressional Acts is that the channel therein refers to a channel in the body of Green Bay.

If this rule of law is properly applicable under such a construction of the Congressional Acts establishing the boundary, as we contend it is, and as the Master concluded, more reason exists for its application, if the line through the body of Green Bay is left undefined by the Congressional Acts.

Assuming that there is some basis for following a most direct and navigable line in the waters of Green Bay as Michigan contends, on the theory that if Congress intended the line to follow a ship channel in the body of the bay, the most direct and navigable route which now exists, should be followed—if, however, the course of the line was left entirely undefined, there is no basis whatever, upon which the most direct and navigable line can be predicated, as the course of the boundary. As there exists no thalweg or filum aquae in the bay, as it is navigable throughout, with no necessary track of navigation, and as any other line fails to give equality in the navigation or beneficial use of the waters, the rule of the geographical center must be followed, in filling this void.

The record and the Master's findings thereon show conclusively that in 1836 these waters were uncharted, that navigation was in its pioneer stage, that vessels had no charts or aids to assist them in navigating the most direct and navigable line. The most direct and navigable line in the words of this court in *Minnesota v. Wisconsin*[85] defeats, rather than promotes equality in the beneficial use of the waters of Green Bay.

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[85]252 U. S. 273.

While we contend that the geographical center line is the only line which will give equality in navigation, equality of navigation is not nearly as important as between two states, as is equality in the beneficial use of the waters. Under the Constitution of the United States neither state can make any regulation which shall not extend to citizens of other states the same privileges and immunities.[86] Congress may not prefer any state by any regulation of commerce to the ports of one state, over those of another, nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties in another.[87] The regulation of all commerce between the states rests with Congress.[88] Accordingly, it is of little importance whether vessels navigating on Green Bay, are within the territorial boundaries of one state, or the other.

The principal use of these waters is fishing, and their beneficial use becomes important because of the non-resident licensing provisions of each state. The so-called most direct and navigable line, places the boundary on the very doorsteps of the fishing colony on Washington Island, and as between Wisconsin fishermen on this island and all down the Door County peninsula on the one hand, and the Michigan fishermen from the west shore of the bay, on the other hand, only the establishment of the boundary following the geographical center rule, can give equality in the beneficial use in the water area.

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[86]Article IV, Sec. 2 (1), United States Constitution.
[87]Article I, Section 9 (6), Contitution of the United States.
[88]Article I, Section 8 (3), Constitution of the United States.

THE MICHIGAN BOUNDARY PROPOSAL HAS NO BASIS IN LAW OR FACT

The Michigan boundary proposal is predicated upon the proposition that Congress meant to describe a line of shipping, or a course customarily traveled by ships in describing the "centre of the most usual ship channel." If this is true the word "centre" is superfluous. Congress knew nothing about such a course of shipping, because no information thereon was available.

The Michigan boundary proposal follows one of several courses of shipping from the center of Lake Michigan to a point nearly opposite the mouth of the Menominee River, that course of vessels now described in modern charts, nearest to the Wisconsin coast, which fails to give equality of area to Wisconsin.

Significantly they adopt a course of shipping which has only been established in modern times. The first course of shipping on these waters, nearly thirty years after Congress established the boundary, does not correspond with the course now proposed as a boundary, and is more remote from the Enabling Act than said course first established. In this connection we quote this court in *Michigan v. Wisconsin*, 270 U. S. 295:

> "* * * * inferences based on *more recent uses* of the channels or on their relative safety and *convenience* as indicated by physical characteristics, all relied upon in the absence of first hand evidence, constitute at best, most unsatisfactory substitutes. * * * *" (Italics ours.)

Significantly, the course of shipping is departed from in the Michigan boundary proposal in the first course from the mouth of the Menominee River. If a course of ship-

ping must be adopted, as established in modern times, said line from the mouth of the Menominee River must be northeasterly, for no shipping, either into or out of this port, would follow the Michigan proposal, either today, in 1836, or any other time.

It is argued that the plaintiff's boundary proposal is not a practical course for shipping. We concede that, but contend that this is not necessary. Many state and national boundaries lie on mountain ridges. Plaintiff's proposed line takes advantage of known points, namely St. Martin's Reef and Whalesbock Shoal. These are not picked for that purpose but happen to lie in the geographical center of the bay.

The Michigan proposal in the first course from the mouth of the Menominee River is not a sailable course for some distance from the mouth of the Menominee River.[89] It is subject to the defendant's own objection.

In the case of *Louisiana v. Mississippi*, 202 U. S. 1, the geographical situation is somewhat similar to this case. The boundary there emerged from the mouth of the Pearl River in a southerly direction into a small bay, thence easterly through said bay into the Gulf of Mexico. The riparian sovereign on the westerly and southerly side of said bay was Louisiana, on the northerly side, the Pearl River was the boundary. The map attached to the decree[90] shows this situation. The boundary was drawn in the decree as curving toward the open part of the bay, rather than proceeding to the center thereof and then turning easterly.

We contend that there is no evidence whatever, nor any rule of law, upon which the Michigan boundary proposal can be predicated.

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[89]Testimony of Col. Lawrence Martin, Record p. 72, 73.

[90]Louisiana v. Mississippi, 202 U. S. 58.

CONCLUSION

In conclusion, we are convinced that the Master correctly found and interpreted the law with respect to the fact that there were mutual mistakes in the former decree, that the same was a consent decree and erroneous, and that the issue of precise location of the boundary in the Green Bay area had not heretofore been determined. We are convinced that each of these three gounds require this court to confirm the Master's conclusions that the matter involved is not res adjudicata.

We believe we have shown that whether the Congressional Acts establishing the boundary in the Green Bay area, are interpreted as the parties contend, or as the Master concluded, the rules of law require the boundary to be established in the geographical center of Green Bay and the entrance thereof.

We believe the Master should supervise the formation of the decree in this cause in order that the same may be correctly described in accordance with the court's opinion.

Respectfully submitted,

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January 10, 1935.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

In Equity

No. 12 Original

STATE OF WISCONSIN,

Plaintiff,

v.

STATE OF MICHIGAN,

Defendant.

BRIEF IN SUPPORT OF PLAINTIFF'S OBJECTIONS TO SUPPLEMENTAL REPORT OF SPECIAL MASTER

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BRIEF IN SUPPORT OF PLAINTIFF'S OBJECTIONS TO SUPPLEMENTAL REPORT OF SPECIAL MASTER

INTRODUCTORY

This is an original action in this Court to determine a portion of the boundary between Wisconsin and Michigan. The matter was referred to Frederick F. Faville, Special Master, who filed his report and recommendations herein on the 12th day of November, 1934. This Court delivered its opinion by Mr. Justice Butler, on the 20th day of May, 1935, and again referred the case to the Special Master to "prepare and submit a form of decree which will give effect to this decision."[1]

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[1] *Wisconsin* v. *Michigan* (Law Ed. Adv. Opinions Vol. 79, p. 879)

The Special Master pursuant to the directions in that opinion from time to time took testimony and received evidence pertinent to the formation of said decree and filed his supplemental report and proposed decree, together with the objections of the plaintiff Wisconsin, to said report and proposed decree, on the 7th day of January, 1936.

The settlement of the decree is now before the court on the objections of the plaintiff, Wisconsin, to the decree as proposed by the Special Master.

THE MENOMINEE RIVER AREA

The plaintiff Wisconsin did not except to the Master's recommendation which disposed of the controversy relating to the islands in the Menominee River. This recommendation was accordingly followed in the opinion of this court. This portion of the decree was determined by a survey suggested by counsel from both states, and is not now in controversy. It is covered by paragraph 3 of the Master's Proposed Decree, pages 15, 16 and 17 of the Supplemental Report of the Special Master. The same line is incorporated in plaintiff's proposed decrees in the alternative. Its adoption is urged by both parties.

THE GREEN BAY AREA

The only remaining issue is the course of the boundary through the waters of Green Bay.

In its opinion of May 20, 1935, the Court reached the conclusion that inasmuch as it was impossible to arrive at a definition of "main channel" as used in the Wisconsin Territorial Act, and "ship channel" as used in

the Michigan Enabling Act, the intention of Congress must be ascertained by the adoption of the geographical center rule.

The Court said:

> "And it confidently may be assumed that when fixing the boundary lines in the waters of the bay Congress intended that Michigan and the State to be erected out of Wisconsin territory should have equality of right and opportunity in respect of these waters, including navigation, fishing and other uses. On the facts found, equality of right can best be attained by a division of the area as nearly equal as conveniently may be made, having regard to the matters heretofore litigated and finally adjudged between these States."

To carry its opinion into effect the court directed that

> "The decree to be entered in this case will establish the boundary through and along, or near, the middle of the waters of Green Bay that are here involved. That line commences at a point midway between the piers at the harbor entrance of the Menominee River; thence east by south seven and one-eighth miles; thence approximately north by east one-eighth east, about eight and seven-eighths miles; thence to and along a line in or near the middle of the bay to a point west of the Rock Island passage; thence easterly by courses and distances to be designated through that passage to the boundary in the middle of Lake Michigan."

Undoubtedly this court, appreciating that a line of geographical center, in the waters of Green Bay (disregarding Chambers and other islands, and considering the mainlands of both states) would pass over Chambers Island, directed the first two courses of the decree, so

as to pass Chambers Island on the west. This line is represented on the map attached to the Special Master's Supplementary Report as the line A B C. The proposals of all parties begin at this point, and this portion of the line is no longer in issue.

It is important to observe that the direction of the line A B extends out from the mouth of the Menominee River approximately at right angles to the axis of Green Bay, and point B is exactly in its center.[2]

The court in its opinion and by its direction refused to cut across this triangle by the line A C, and disregarded the possible convenience of cutting corners in this area.

From point C it was necessary to fix upon a line which would extend northeasterly up the middle or center of Green Bay which would give "equality of right and opportunity in respect of these waters."

The Master was of the opinion that such a line should, if possible be tied to definite lights, or other marks if it could be done without departing substantially from the direction of the court to establish a boundary that would do equity to both states.[3] We have no quarrel with this principle, although there appears to be nothing in the court's opinion to support the same, and although the two courses of the boundary fixed by the court in its opinion, make no attempt to use convenience as a basis.

The Master was also of the opinion that the line in departing from point C should favor the State of Michigan to the extent necessary to compensate her for the loss of area occasioned by the necessity of locating line BC west of Chambers Island.[4] The area in the north end of Green

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[2]Testimony Earl M. Nisen, Record, page 12.
[3]Record, page 15.
[4]Record, page 14.

Bay would many times more than compensate for the loss of water area in the neighborhood of Chambers Island.[5]

MASTER'S RECOMMENDED DECREE

The line recommended by the Special Master is the line A B C K L R H S as shown upon the map attached to his Supplementary Report. Counsel have modified the stipulated record so that all references are to this map.

Plaintiff's Objections

Plaintiff's objections to the proposed decree recommended by the Master resolve themselves into two principal objections.

1. That the line recommended by the Master through the length of the bay northeasterly and southwesterly, to-wit: C K L R is inequitable and does not conform to the opinion of the court, and that the line C D E F, or C Y D a', proposed by the plaintiff are more equitable lines. These lines and that recommended by the Master are roughly parallel to each other, and about one and one-half to two miles apart, except that the lines proposed by Wisconsin suggest a division of the waters of Green Bay northerly of the point west of the Rock Island Passage.

2. That the line R H S recommended by the Special Master which is the line from the point directly West of the Rock Island Passage to the middle of Lake Michigan, is inequitable to Wisconsin, and does not conform to the opinion of the Court. In this respect the line proposed by the Special Master proceeds from the waters of Green Bay to the center of the Rock Island passage on an exact east and west course, but from the center of

[5]Testimony, Earl M. Nisen, Record p. 18.

the Rock Island passage instead of continuing on the east and west course, the line H S as recommended attempts to be perpendicular to the axis of Lake Michigan and is an attempt to find the shortest line between the center of Lake Michigan and the Rock Island passage.

The first objection raises the simple question as to whether the lines proposed by the plaintiff Wisconsin are more nearly in the middle of Green Bay than that recommended by the Master, and if so do the monuments which the Master has attempted to tie his recommended line to, justify the divergence.

The second objection raises the question as to whether Wisconsin is entitled to have the waters of Green Bay divided or only that portion thereof south of a line running exactly east and west through the Rock Island passage.

First Objection

Both the line C K L R recommended by the Special Master and the line C Y D a' proposed by Wisconsin, are on a line with the Minneapolis Shoal light, on the north end of Green Bay, where a permanent light is being erected.

The Master's line takes advantage of point L on the southeasterly side of the Whalesback Shoal which is a lighted gas buoy whereas the Wisconsin proposals take advantage of point D, a spar buoy on the northwesterly side of the Whalesback Shoal. There is no control in such buoys being merely a spar or a lighted buoy.[6] The lighted gas buoy is maintained approximately seven and one-half months in the year.[7]

The line recommended by the Master attempts to take advantage of a bearing on the Chambers Island light (point X) on the southerly end, as does the alternative line

[6]Testimony Earl M. Nisen, Record, page 9.

[7]Testimony Capt. Charles H. Hubbard, Record, page 35.

C Y D a' proposed by the plaintiff. Chambers Island light is a permanent lighthouse maintained during the navigation season, and a less distinct acetylene light is maintained in winter.[8]

Witness Nisen, Senior Engineer in the United States Engineering Department at Milwaukee, testified that in his opinion the most equitable boundary from point C would be the line C Y D a'.[9] This line takes advantage of bearing on Chambers Island light on the southern end, Minneapolis Shoal light on the northern end and passes over the black spar buoy on the northwest side of the Whalesback Shoal; the line recommended by the Master is further easterly and takes advantage of the same bearings on both the northerly and southerly end, but passes over the light buoy on the southeasterly side of Whalesback Shoal. Mr. Nisen was interested in the problem because it was in his district.[10]

The Master's report calls attention to the fact that the record in this proceeding shows that by accurate measurements of a planimeter the water area of Green Bay "here involved" is divided almost exactly equally between Wisconsin and Michigan, with a slight advantage to the state of Wisconsin in the decree that the master presented.[11]

The testimony referred to is that of witness R. E. Smith, State Geologist for the State of Michigan, who measured the water area on the easterly and westerly sides of the line A B C K L M H. He did not measure the water area on the easterly and westerly sides of line A B C K L R H, the line recommended by the Master.[12]

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[8]Testimony Capt. Charles H. Hubbard, Record, page 37.
[9]Record, pages 17 and 18.
[10]Record, page 19.
[11]Master's Supplementary Report, p. 13.
[12]Testimony R. E. Smith, R. pp. 19 and 20.

There is no evidence comparing water areas with respect to the line recommended by the Master.

We contend that the testimony of Mr. Smith is of little or no value in this respect, for the reason that his procedure was to extend line M H to the westerly shore of Green Bay. He allotted to Wisconsin in his measurements all of the water area easterly of line B C K L M H and to Michigan the area inclosed by line A B C K L M and the point where line M H would intersect the west shore of Michigan. It eliminated from the Michigan allotment all of the north end of Green Bay and all of the area lying north of the line M H extended to the west shore, and at the same time charged Wisconsin with the area of water lying south of the line M H.[13] The same would be true if the Master's line were considered and Michigan were not charged with the area of water lying north of line R H extended to the west shore of Green Bay. Accordingly, with the geographical situation being as it is, the greatest angle of the turn going through the Rock Island Passage produces the nearest line to Washington Island, Wisconsin, resulting in the greater inequity to Wisconsin, and at the same time, according to the method adopted for measurements by Mr. Smith, results in the calculation of a smaller water area for Michigan, for the purposes of comparison, so that the defendant gains at both ends. It is obvious that there is three times the water area on the outside of the turn, which should properly be allotted to Michigan than there is on the inside of the turn which should be allotted to Wisconsin.[14]

Witness Hubbard, testified that the establishment of the lights and lighted buoys in Green Bay are for navigation aids;[15] that the lights and buoys are each valuable for fishermen to locate themselves; "* * * if he hasn't a

[13]Record, page 21.
[14]Testimony F. P. Steinmetz, Record, p. 38.
[15]Record, page 25.

lighthouse to see, he has a buoy, which is equivalent to a lighthouse in locating himself. * * * I would say a lighthouse is more desirable than a buoy in locating yourself."[16] He testified that the trend of the Rock Island passage is not east or west but is about southeast and northwest, and is pretty near perpendicular with the axis of Lake Michigan and the axis of Green Bay, so that the axes of Lake Michigan and of Green Bay are very near parallel, and that the shortest line through the Rock Island passage between said axes would not pass through said passage on an east and west course.[17] He testified that he had made no calculations about the equality of division of waters, but was talking about a line between definite marks. He conceded that the line L M H hampers the fisherman of Wisconsin as compared with those of Michigan, with respect to equality of water area.[18] He testified that fishermen ordinarily determine their position by time as a run out, so many hours and so many minutes from shore and they base their location almost entirely on that and depth of water, and also on lights.[19]

Witness Steinmetz testified that he was an engineer with the Public Service Commission of Wisconsin, that he prepared Exhibit A and drafted the line A B C D E F G H J, which attempts to follow the geographic center of the bay placing the northern limits of the area involved in this litigation as the points of projection that inclose Big and Little Bay de Noc.

The Rule of Fauces Terrae

We contend as we did upon the submission of the Master's original report, that in applying the geographical

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[16]Record, page 26.
[17]Record, pages 29 and 30
[18]Record, page 32.
[19]Record, page 32.

center rule in an area of this kind, the line be drawn between points which are geographically midway between two shores. We have pointed out that the sides of the channel are to be treated as a straight line, a line being drawn across indentations under the rule of fauces terrae.[20] The rule was applied in *Ocean Industries Inc. of Santa Cruz* v. *County Super. Ct.*, 200 Cal. 235, 252 Pac. 722, and in *Manchester* v. *Mass.*, 139 U. S. 240 (affirming 152 Mass. 230, 25 N. E. 113). In the latter case the question was one of jurisdiction, of the area so enclosed.

Plaintiff's proposed alternative decree comprising the line A B C D E F G H is a geographical center line, all of the points lettered being midway between maximum extremities on opposite sides of Green Bay. At all points along this line water nearest to Michigan is thrown to Michigan, and water nearest to Wisconsin is thrown to Wisconsin, with the exception of Green and Chambers Island, in the neighborhood of that portion of said line designated A B C, which has been directed by the Court, the Court having made such adjustments as it deemed reasonable.[21]

In the case of *Minnesota* v. *Wisconsin*, 258 U. S. 149, after the announcement of the opinion the decree was entered confirming the report of the boundary Commission. In the lower end of the St. Louis River there were a number of bays and points where promontories stretched into the water area from both states, and it appears from the decree that the line was drawn midway between these extremities.

At the point where Rice's point protrudes from the Minnesota side and Connors from the Wisconsin side, the court in its opinion directed the Commission to run the boundary midway between these points.[22]

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[20]Brief of Plaintiff on Exceptions to Report of Special Master, pp. 118 to 122, inclusive.

[21]Testimony F. P. Steinmetz, Record p. 38 to 41 inclusive.

[22]*Minnesota* v. *Wisconsin*, 252 U. S. 273 at 283.

We contend that the alternative lines proposed by Wisconsin from Chambers Island north to the point where the lines turn to go through the Rock Island passage, namely the lines C D E F or C Y D a' are all more nearly in the geographical center of Green Bay than the line recommended by the Master. At Whalesback Shoal point D is almost exactly in the center between Cedar River or Deadmans Pt., Michigan, and Deathdoor Bluff, Wisconsin, whereas point L is more than a mile easterly of such center. At point R the lines D E or D a' are almost exactly in the center between the Michigan west shore and Washington Island, Wisconsin, whereas point R is considerable easterly of such center. This is easily ascertained by simple measurements across the bay, with a rule.

The chief question here is the adoption of point D as proposed by Wisconsin or point L as recommended by the Master.

Obviously, the location of the boundary should not depend upon whether the United States Lake Survey office has placed a spar buoy or lighted gas buoy at a particular location. Witness Nisen testified "There is no control in that being a black spar buoy. It can be a lighted buoy just as well as a spar."[23] As we have stated, simple measurements with a rule across the bay establishes the fact that the black spar buoy on the Whalesback Shoal, point D, is almost exactly in the center, whereas the lighted gas buoy, point L is considerably to the easterly of such center.

Second Objection

The chief point involved is perhaps the line through the northern end of Green Bay. The Special Master and the defendant take the position that the area north of the

[23]Record, page 9.

line R H is not to be divided, and that the division stops when one in going up the bay reaches a point west of the Rock Island passage.

In the opinion in this case the court has directed that the line follow "in or near the middle of Green Bay proceeding northerly to a point west of the Rock Island passage; thence easterly by courses and distances to be designated through that passage to the boundary in the middle of Lake Michigan." We do not deem that the court meant exactly west for three reasons:—First, to terminate the northerly line at a point west of the Rock Island passage results in cutting corners across the true geographical center line which the court refused to do in the Menominee River section; secondly, the court had already announced that the two states should have equality of right and opportunity in respect of these waters and that equality of right can best be obtained by division of the area as nearly equal as conveniently can be made, and the termination of the northerly line at a point exactly west of the Rock Island passage does not give such equality; and, thirdly, the court directs that the line proceed thence "Easterly by courses and distances to be designated" through the Rock Island passage. From a point directly west of the Rock Island passage, only one course is necessary, directly east, through the Rock Island passage, as the Master has recommended the same. The fact that the court recognized that the courses to be followed after reaching the point west of the Rock Island passage, would be more than one course, and would proceed easterly rather than directly east, indicates, that the court intended a line to be drawn equidistant from Michigan and Wisconsin, and by the term "west" did not mean exactly west.

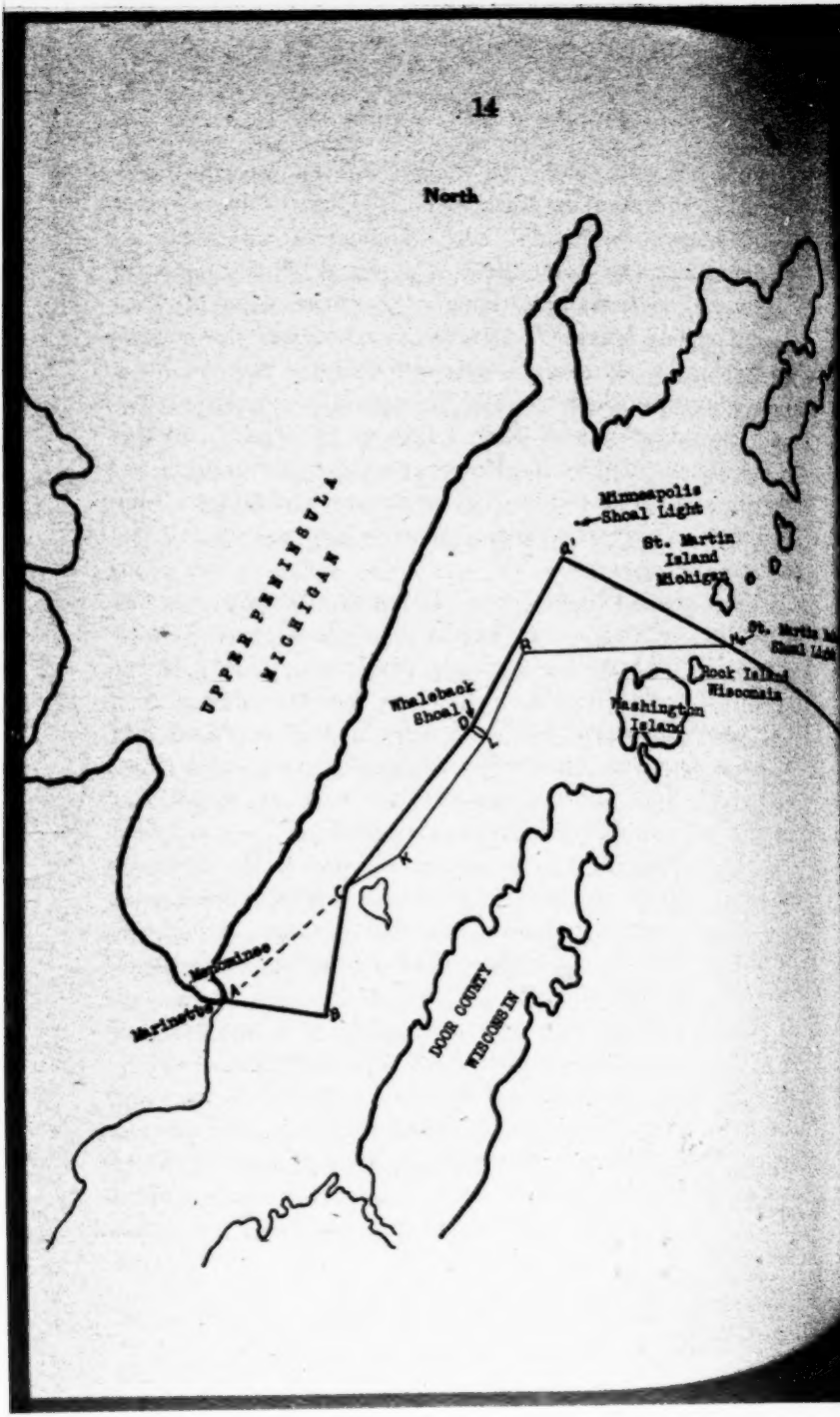
The sketch map on page 14 shows the geographical situation in the area in dispute. Observe that the Michigan peninsula, with Menominee, Michigan at its point, obtains by the line A B equality of right with Marinette, Wisconsin, although the entire area of Wisconsin beyond Marinette is much greater than that served by Menominee, Michigan. Observe that the reverse situation, where the Door County, Wisconsin, peninsula occurs, with Washington and Rock Island at its head, the line R H recommended by the Master, results in inequality, that the line a' H proposed by Wisconsin treats both states fairly, and is consistent with the principle adopted off the Menominee River.

It is argued that because Michigan does not share in a division of water area southerly of the line A B, Wisconsin should not share in such division northerly of the line R H. The line A B however, emerges into Green Bay perpendicular to the west shore, so that Michigan and Wisconsin residents, riparian thereto, have equality of use and right, and points along the line A B are equidistant from Michigan and Wisconsin mainland.

Green Bay does not cease at the line R H. It bends at right angles and continues to the southeast, and until one passes through the Rock Island passage, the waters of Green Bay do not close. Witness Steinmetz testified: "I see no justification for cutting off the area at the line M H and making such calculations."[24] The line M H or R H does not correspond to the line A B. "The line corresponding to the line A B is a line drawn northeast and southwest from Washington Island northeast to point Detour."[25] Mr. Nisen also testified that the situation at the mouth of the Menominee River and in the north end of Green Bay were not alike geographically from the stand-

[24]Record, page 38.

[25]Testimony F. P. Steinmetz, Record, page 39.


North
UPPER PENINSULA
MICHIGAN
Minneapolis
Shoal Light
St. Martin
Island
Michigan
Whaleback
Shoal
Washington
Island
Door Island
Wisconsin
DOOR COUNTY
WISCONSIN
A
B
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L

point of the argument made that there is no division south of the Menominee River.[26]

The opinion of this court states plainly that it was the intention of the court that Michigan and Wisconsin should have equality of right and opportunity in respect of these waters, including navigation, fishing and other uses.

The navigation question involved presents no difficulties. The Courts opinion recognizes that no right of either party to use the waters of the bay for navigation is involved. Neither state may make any regulation which shall not extend to citizens of other states the same privileges and immunities.[27]

The regulation of all commerce between the states rests with Congress.[28] It is the fishing industry plying in these waters that is of chief concern. The chief industry of Washington Island is fishing, and we are satisfied that the court intended these Wisconsin citizens to have equal rights with those of their Michigan neighbors to the north and west.

Certainly if the line R H is adopted as a course in the boundary, it can only be justified in that it is more direct and convenient, and cuts corners. In that event the same argument justifies the establishment of the line A C in lieu of the line A B C off the mouth of the Menominee River.

Point R as point a' is in open water and tied to lights only by bearings. There is no advantage enjoyed by either in this respect.

The Supplementary Report of the Special Master resorts to the Wisconsin Territorial Act to justify a right angle turn in the center of Lake Michigan and the resulting

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[26]Record, page 16.
[27]Article IV, Section 2 (1), United States Constitution.
[28]Article I, Section 8, (3) Constitution of United States.

line H S as a line from the Rock Island passage perpendicular to the center of Lake Michigan. The Court's opinion rests upon the doctrine of equality of right. The line H S may properly be sustained on the basis that it *gives equality* of right to the citizens of both states. Certainly the same reason applies to extend such a line into Green Bay to point a'. It thereby becomes perpendicular to the axis of Green Bay, which is approximately parallel to that of Lake Michigan. A glance at the sketch map[29] shows how the result of the lines R H and H S operates to hem in Washington Island, Wisconsin, without regard to an equal division of the waters. We submit that in addition to recognizing the principle of equality the line a' H S would be one continuous straight line, on a simple bearing namely 120 degrees, and from a practical standpoint is more desirable than the two lines of different bearings.

CONCLUSION

In conclusion, we call attention to the fact that the Master's Supplementary Report and Proposed Decree does not carry into effect the equitable doctrine announced by the court in its opinion, and plaintiff urges, that in the event the court shall determine that it is desirable that the boundary be drawn on a line with existing lighthouses and over existing aids to navigation, insofar as is possible, and that the plaintiff Wisconsin is entitled to an equitable portion of the area lying north of a line drawn exactly east and west through the Rock Island passage, that the proposed decree of Wisconsin be adopted,[30] and

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[29]P. 14.

[30]Exhibit D, pp. 19, 20, 21 of Master's Report (In lieu of the phrase beginning with the word "thence," line 4, page 20, and ending with the word "thereof" in line 9, page 20, there be inserted that part of the Master's proposed decree beginning with the word "which," line 4, page 16, and continuing to the end of paragraph 3 on page 17).

that in the event that the court shall determine that the various lighthouses and aids to navigation should not be permitted to vary the boundary and that a precise geographical center line should be drawn through the Green Bay water area, that Wisconsin's alternative proposed decree be then adopted.[21]

[21]Exhibit E, pp. 22, 23, and 24, Master's Supplementary Report (except that in lieu of the phrase beginning with the word "thence" line 6, page 23, and ending with the word "thereof" line 11, page 23, there be inserted the phrase beginning with the word "which" line 4, page 16, and continuing to the end of paragraph 3 on page 17 of Master's Proposed Decree).

Respectfully submitted,

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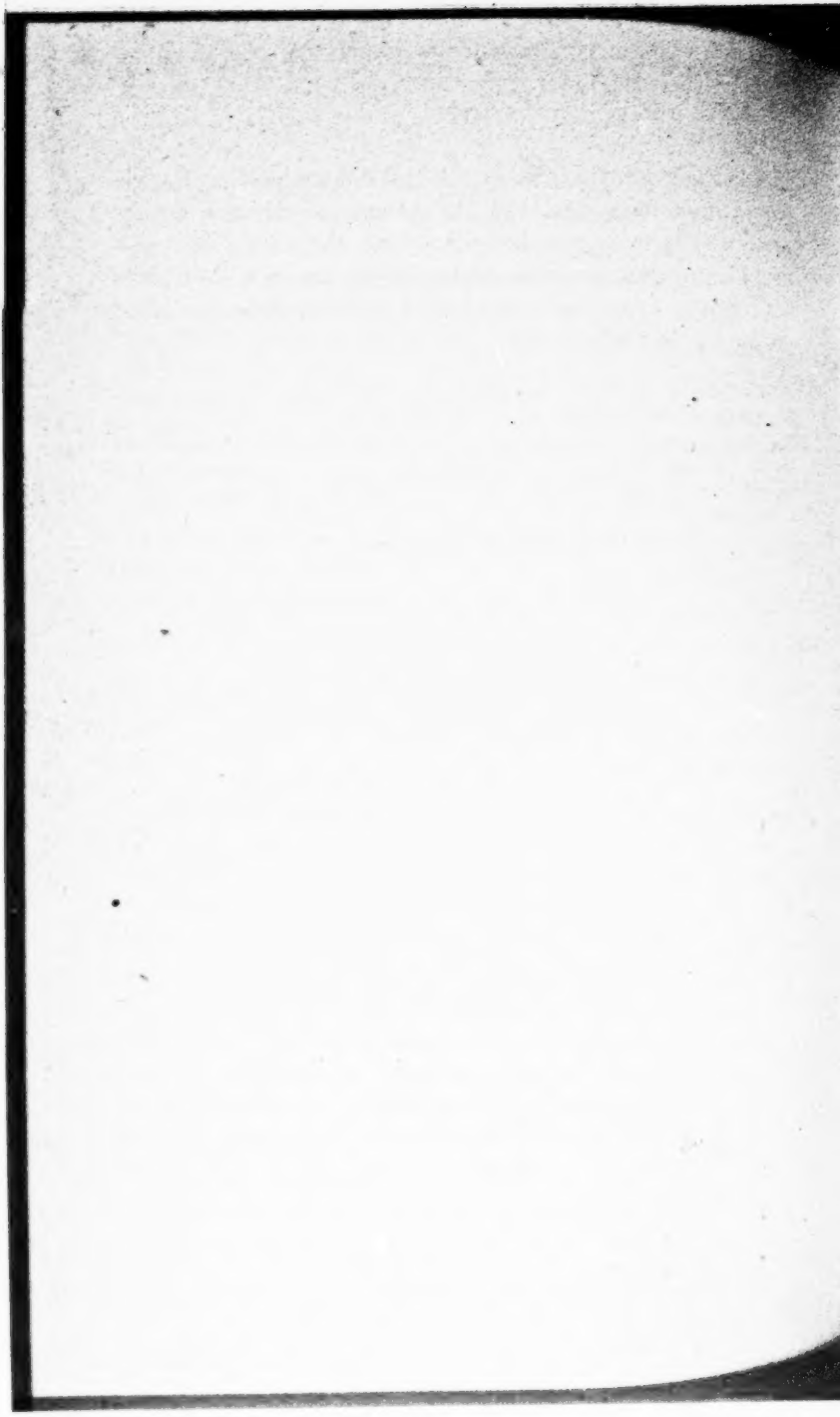

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APR 8
CHARLES ELM

IN THE SUPREME COURT of the UNITED STATES

No. 12, Original

In Equity

STATE OF WISCONSIN,
Plaintiff,

vs.

STATE OF MICHIGAN,
Defendant.

BRIEF OF THE DEFENDANT

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IN THE SUPREME COURT
of the
UNITED STATES

No. 15, Original — In Equity

STATE OF WISCONSIN,
Plaintiff,

vs.

STATE OF MICHIGAN,
Defendant.

BRIEF OF THE DEFENDANT

STATEMENT OF FACT—FORMER SUIT

The present suit is in the nature of a bill of review and it is, therefore, important to begin its consideration with a full knowledge of the issues and findings in the former case.

Michigan filed its bill of complaint[1] against Wisconsin alleging that the boundary between Michigan and Wisconsin from Lake Superior to Lake Michigan was unsettled and in doubt and *should be definitely established.* The bill further alleges differences between descrip-

[1] *Michigan vs. Wisconsin*—Opinion 270 U. S., 295
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tions of such boundary existed in the constitutions of the respective states.[2]

Disputes as to jurisdiction over unsurveyed islands in the Menominee River were alleged in paragraph twenty, and in paragraph twenty-one the dispute over the course of the line in Green Bay.

Michigan further alleged that Wisconsin was in possession of territory (land and water) which had been granted to Michigan[3] and to negative the anticipated defense of acquiescence and possession alleged in the paragraph, that delay in bringing action was because of excusable ignorance as to Michigan's rights.

The prayers of the bill were for determination of the boundary under the Michigan Enabling Act[4] and for definition and marking thereof and the recovery of any territory granted to Michigan by that act, and possessed by Wisconsin.[5]

The defendant, State of Wisconsin, made a motion to dismiss that bill of complaint based on the claimed fact that documents, of which the courts would take judicial notice, were such as to show long possession of the territory in dispute by Wisconsin and acquiescence therein by Michigan.

This claim by Wisconsin is stated in the brief filed in support of the motion on pages 2 and 3 thereof, as follows:

> "The motion of the State of Wisconsin rests primarily upon the well established principle that long continued acquiescence by the complaining state in a boundary line not conforming exactly to the description of such boundary line as contained in the

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[2]Paragraphs 16 and 17—pages 32-33-34 of the bill of complaint in former case.
[3]Bill of Complaint in former suit, paragraph 23.
[4]Michigan Statehood Act affirmed the boundaries described in the Enabling Act.
Enabling Act—June 15th, 1836 is 5 U. S. Stat. at L., 49.
Statehood Act—January 26, 1837 is 5 U. S. Stat. at L., 144.
[5]Pages 42-43 former Bill of Complaint.

> grant to such state, and long continued exercise of jurisdiction over the territory in question by the defendant state, coupled with a general recognition and acceptance of such boundary line, operates to validate it and vest in the defendant state from the beginning a valid title by prescription or a right in the nature of a prescriptive right, and that the right so established and recognized takes effect, not as an alienation of territory, but as a definition of the true or ancient boundary. The continued claim on the part of the state of Wisconsin recognized, in the manner hereinafter indicated by both the federal government and the state of Michigan, amounts to a practical construction of the original act, . . .''

Michigan filed a brief in opposition to this motion to dismiss and among many other arguments stated, on page 57 of its brief, item three:

> ''The defense of acquiescence is essentially a matter of evidence, and is not available in support of such a motion as this, unless it conclusively appears to the court that all the evidence available, upon the material allegations of the complaint, is before the court.''

This court denied the motion to dismiss and Wisconsin answered. The answer sets up acquiescence as an affirmative defense to Michigan's claim of the construction of the Michigan Enabling Act. The defendant's brief in that case deals almost entirely with this defense. The claim is specifically set up on page 37 citing many decisions of this court, some of which were cited by this court later in its opinion, and is diversely set up as estoppel on page 337, et seq., of the brief.

The entire argument of the defendant, state of Wisconsin, through its brief, was to the effect that the boundary as in actual use was the boundary defined in

the Act of Congress. That the parties by the exercise of jurisdiction on the one hand and acquiescence therein on the other, had put a construction on the act which would not be disturbed by the court.

In answering this claim, the plaintiff, state of Michigan, alleged on page 111 of its brief:

> "The exact location of the line claimed to be acquiesced in is unknown in two sectors."

On page 112 of plaintiff's brief:

> THE MENOMINEE–BRULE SECTOR
>
> "The present condition is utter confusion. The defendant (Wisconsin) is in possession of some but not all, of the Islands in the Menominee River below the division point suggested by Congress in the Wisconsin Enabling Act. Plaintiff is in possession of other of these Islands, and still others are not now known to be, under the jurisdiction of either State, other than the profession of the respective constitutions as to boundaries."
>
> GREEN BAY SECTOR
>
> "No line has ever been determined upon in this sector. The grant to plaintiff is clear. The grant to defendant follows the grant to plaintiff. The only indication of any location of the line comes from the possession by the defendant of certain islands."

On page 113 of plaintiff's brief, plaintiff, discussing the application of the rule of acquiescence, took this position:

> "It is available only so far as the lapse of time may tend to raise the presumption that a possible

construction of a doubtful line was a proper construction."

citing the decisions of this court as follows:

Louisiana vs. *Mississippi*, 202 U. S., page 1.
Virginia vs. *Tennessee*, 148 U. S., page 503.
Rhode Island vs. *Massachusetts*, 4 Howard, page 591.

Michigan, by replication joined issue on this state of facts.

The issue thus framed might be stated: *The existence of a boundary line which conformed to the grant to such extent that possession on the one hand and acquiescence therein on the other, amounted to a construction by the parties or was the best evidence of the intent of Congress.*

As to the islands in the Menominee River, Wisconsin was claiming that Michigan had acquiesced in the division thereof proposed in the Wisconsin Enabling Act, and later affirmed by grant in the Wisconsin Statehood Act.

Michigan had possession of certain land claimed to be islands thus granted to Wisconsin and asserted this to *defeat the claim of acquiescence.*[6]

All through its defense, Wisconsin relied upon the Michigan Enabling Act and the Wisconsin Statehood Act as showing color of title to the area possessed by Wisconsin.[7]

Nowhere did Wisconsin assert any claim to area possessed by Michigan.[8]

The entire boundary was in issue. Was there a line adopted by user and did it conform to the congressional definition?[9]

[6]Michigan's brief in former case, pages 32-33, also 111-112-113-114. See also Opinion, 270 U. S., pages 312-313.
[7]Opinion, 270 U. S., page 313.
[8]Opinion, 270 U. S., page 306.
[9]Opinion, 270 U. S., page 300.

The essence of the opinion was that possession and acquiescence had resolved all doubts as to the location of the line defined by Congess. That each state was entitled to the area it possessed. Michigan was given nothing over which Wisconsin had jurisdiction, and Wisconsin was given nothing over which Michigan had jurisdiction.

The evidence and arguments in that case were sufficiently extensive to call forth the comment of this court.[10]

It is not necessary to refer to those proofs and arguments extensively because of the full and conclusive findings contained in the opinion and the definite description in the decree.

The court, in its opinion, found with the claims of Wisconsin on possession and acquiescence, disposing of the Michigan theory of non-acquiescence, by holding that the claimed islands in the Menominee River possessed by Michigan, within the grant to Wisconsin under the Act of Congress, were not islands, but mainland of Michigan.[11]

In the former trial and in the opinion, the boundary was divided into three sections. The same principles of law were determinative as to each section.

Only two of these sections were in issue in this case and the findings and recommendations of the Special Master not excepted to are conclusive as to one.

There remains, therefore, to consider only the Green Bay section.

As to this section, no differences occur in the descriptions under the two Statehood Acts. The calls are down the channel of the Menominee River "to the center of the most usual ship channel of the Green Bay of Lake Michigan; thence through the center of the most usual ship

[10]Opinion, 270 U. S., page 300.
[11]Opinion, 270 U. S., page 313.

channel of the said bay to the middle of Lake Michigan".[12]

The court, in its opinion, found that there were two ship channels to either of which this definition might apply. The evidence in the case defines these two *ship channels.* Both are routes lengthwise of the bay from the City of Green Bay to Lake Michigan and not issuing from the mouth of the Menominee River. The opinion apparently recognizes this fact.[13]

> "The channel claimed by Wisconsin, *after leaving the mouth of the Menominee.*"

The opinion thus recognizes a gap between the mouth of the Menominee and the "center of the most usual ship channel".

This court comments upon the evidence as to which of these two ship channels was the *most usual* and disregards it on the theory that this issue was determined by possession of the intervening islands by Wisconsin.[14]

The court, in its opinion, on the Menominee River section, announces the doctrine that possession of a part of a tract, under color of title describing it, extends that possession to the entire tract. It is apparent that the same principle was applied in the Green Bay section. The Act of Congress gave color of title to Wisconsin to the center of the ship channel west of Chamber's Island and north of Washington Island.

The court had before it a choice, one of two channels as the most usual ship channel specified in the act.

Possession of the islands between these channels by Wisconsin is extended under color of title, the Michigan Enabling Act, to the *center of the ship channel,* passing

[12]Opinion, 270 U. S., page 314.
[13]Opinion, 270 U. S., page 315. Also Wisconsin's brief in former case, page 22, and sketch R. 98.
[14]Opinion, 270 U. S., page 316.

west of Chamber's Island and through the Rock Island Passage into Lake Michigan.

The opinion in effect makes this the boundary in this section from a point opposite the Menominee River northward.

No claim was made at that time that the "center of the ship channel" was a geographic center. Chamber's Island lies to the eastward of the geographic center line of Green Bay. Its possession by Wisconsin would have been immaterial upon *such* construction of the language of the Act of Congress.

An examination of the proceedings for settlement of decree and the decree itself conclusively show that this was the determination of the court and its reason therefor.

The defendant, State of Wisconsin, for the *first* time sought affirmative relief against the State of Michigan in its *proposed decree.* By this proposed decree Wisconsin attempted to lay claim to *all* the islands in the Menominee River below Quinnesec Falls and also to the *triangle* in the waters of Green Bay opposite the City of Menominee.

The plaintiff, State of Michigan, filed objections to the proposed decree and a motion to amend the proposed decree and an argument and brief in support thereof. It is therein stated that the first objection relates to two specific tracts:

> "First, to the triangle in the waters of Green Bay, lying between the lines of a direct water course from the Menominee Harbor to the sailing objective opposite Chamber's Island light and a course from Menominee Harbor to the most usual ship channel of Green Bay, and along that channel to the same sailing objective."

The second objection dealt with islands in the Menominee River below Quinnesec Falls and was based upon two grounds: First, that the division point should be the lower end of Quinnesec Falls as provided in the Wisconsin Enabling Act and that Michigan was entitled to such islands as there were in the river between the upper and lower falls. This objection also involved the property known as Sugar Island which was then under the jurisdiction of Michigan.

In support of the first objection the plaintiff, in its brief, argued that the boundary in the defendant's proposed decree was in the reverse order from the grant and that "the language of the Michigan Enabling Act, 'down the main channel of the Menominee River, to the middle of the most usual ship channel of Green Bay', is the basis for Michigan's claim".

This language is the effective grant never having been altered by enactment or use."

> "Michigan claims for it a construction that the line upon entering Green Bay at the mouth of the Menominee shall pass in a direct course to the middle of the most usual ship channel of the Green Bay."

Attention is called to the fact that the plaintiff had urged in its briefs the point that three islands below Quinnesec Falls were being held by Michigan. We quote from that brief:

> "Surely the opinion is inconsistent with the idea that Wisconsin is to have any land now occupied and taxed as a part of Michigan."
>
> " 'The rule is well settled—that actual possession of a part of a tract by one who claims the larger part, by color of title describing it, extends his pos-

session to the entire tract, *in the absence of actual adverse possession of some part of it by another.*' "

this language being a quotation from the opinion of this court in that case on page 276.

"The pleadings in the case would not warrant a decree granting the affirmative relief to Wisconsin, and Michigan has not been put in position to defend its present holdings.

"Attention is directed to the answer of defendant wherein no claim is made for affirmative relief and we specifically call attention to paragraph 24 and quote therefrom as follows:

" 'Defendant alleges . . . that the boundary line claimed by the State of Wisconsin is the true boundary line and always has been such boundary line and the boundary line intended by Congress to mark the limits of sovereignty of the two respective States and that such boundary line has always been accepted by the parties to this controversy strictly in accordance with the claim of the State of Wisconsin . . . . That for the entire period since 1836 and now Wisconsin has openly exercised her right of sovereignty over all territory within the line as claimed by said State of Wisconsin.' "

"On page 17 of the Answer in the last paragraph thereof is found the following:

" 'Wherefore defendant prays that plaintiff take nothing by this complaint and that this action be dismissed and that it be adjudged that the boundary line as claimed by the State of Wisconsin is the true and correct boundary line between the State of Michigan and the State of Wisconsin.' "

Wisconsin's proposed decree defined the line after leaving the Menominee on a direct course for the sailing objective west of Chamber's Island light and thence to

and through the Rock Island Passage—*this is the line now recommended by the Special Master.*[15]

Michigan objected to this line,[16] stating its reasons,[17] and proposed a line from the mouth of the Menominee to the center of the ship channel, determined by the opinion to be the *most usual,* by the shortest and most direct route, and thence along the center of said ship channel west of Chamber's Island and through the Rock Island Passage.[18]

During the argument of the main issues of the former case and in the briefs of counsel, it was first suggested by the defendant, State of Wisconsin, in its brief, on page 253, that the sailing courses given on the charts were the center of the respective ship channels.

On that page it is said:

> "It is the claim of Wisconsin that the boundary runs from the mouth of the Menominee River to the west and northwest of Chamber's Island, following approximately the dotted line on the map (referring to Michigan's Exhibit 115, a chart of Green Bay). Michigan claims that the boundary proceeds almost straight east from the mouth of the Menominee River until it intersects the dotted line close to Door County peninsula, and that it then approximately follows said dotted line through what is marked as the Strawberry Channel."

This claim on behalf of Wisconsin, that the sailing course as given on the charts was the center of the ship channel, was also followed in its proposed decree, except that Wisconsin proposed to use the modern shipping course direct from the mouth of the Menominee to the objective off Chamber's Island instead of going directly

[15]Defendant's Proposed Decree—former record, pages 2-3.
[16]See record in former case, Plaintiff's Objections to Proposed Decree. Being Defendant's Exhibit L in this case.
[17]Argument and brief on objections. Same exhibit.
[18]Motion to Amend Proposed Decree. Same exhibit.

to the ship channel west of Chamber's Island which passed down Green Bay to the village of Green Bay at its foot, and then along that ship channel to the same objective.

Michigan acceded to the argument that the sailing course was the center of the ship channel referred to, but insisted that the opinion determined only that the ship channel west of Chamber's Island was the most usual, and that the boundary should leave the mouth of the Menominee and pass to the center line of this western ship channel in the shortest possible route, which would be along a perpendicular to that center line.

Both parties were in accord at the time that these charted shipping courses determined by the Government agency to be the desirable courses in navigating the respective passages, were the best evidence of the location of the center line of the ship channel to which they referred. The parties were also in agreement that such lines made a satisfactory boundary as being readily ascertained and commonly known.

These issues were argued before Justice Sutherland, who later announced a decree incorporating Michigan's claims on both these issues.[19]

This decree (except for transcriptional errors hereafter referred to) defines a line which follows the sailing course given on the government charts through the ship channel determined by the opinion to be the one referred to in the Act of Congress as "the most usual ship channel of the Green Bay of Lake Michigan".

The gap between the mouth of the Menominee and the "center of the ship channel" is closed by a straight line on the most direct route.

Thus the issues, the existence of a "most usual ship

[19] *Michigan vs. Wisconsin*, 272 U. S., 398.

channel", its location, and the location of its center line, were all before the court and all determined.

SUBSEQUENT EVENTS

NON-RESIDENT FISHING LICENSES

Because it was several years after the entry of the decree before this suit was commenced, it is also proper to determine what circumstances arose in the interim which might affect the situation.

Michigan has alleged[20] and proven[21] that subsequent to the entry of the decree, an all winter carferry service was established into the Menominee River. That an open lane was thereafter maintained through the ice of Green Bay, which *after leaving the mouth of the Menominee River* turned to the south on a course for Sturgeon Bay Canal. This open water lane effectually prevents Menekaune, Wisconsin, fishermen from passing out over the ice opposite their homes to the Wisconsin winter fishing grounds and made it necessary for them to come over into Michigan and pass across the Michigan grounds to reach their own.

The long circuitous route was ruinous and the Wisconsin fishermen began setting their nets on the Michigan grounds.[22]

There were a large number of Wisconsin fishermen interested in this area—about two hundred.[23] The Michigan wardens ordered them out and threatened to seize their nets.[24] Following considerable newspaper talk, there was a conference between Governors and a Gentleman's Agreement to refrain from prosecutions along the

[20]Answer, pages 13-14.
[21]Testimony of Oscar E. Olson, R. 43.
(See Defendant's Exhibit E for steamer course from Menominee River to Sturgeon Bay—this is the course kept open by the carferries.)
[22]Cross-examination of Lawrence Hansen, R 44.
[23]Testimony of Frank F. Seidl, R 43-44.
[24]Testimony of Joseph Hornick, R 48.

line, pending investigation or suit on Wisconsin's claims.[25]

Prior to the making of this agreement, the Wisconsin fishermen in the Washington Island area had generally purchased Michigan non-resident licenses—likewise many of the Menekaune residents.[26]

Commencing about fifteen years before the entry of the decree (twelve years before suit was brought) the Michigan Conservation officers had patrolled the line thereafter defined by the decree as the boundary.[27]

The evidence clearly shows that the purchase of non-resident Michigan licenses fell off about ninety per cent (90%) in this area after the making of this agreement.[28]

The reduction in license fees paid was nearly ten thousand dollars ($10,000.00) per annum, and the amount involved, if the Menekaune residents were to fish on Michigan grounds, would be at least twenty thousand dollars ($20,000.00) per annum.[29]

It is thus apparent that subsequent to the entry of decree, events made it highly desirable to both Menekaune and Washington Island fishermen that the boundary defined by this decree and theretofore patrolled by Michigan officials be erased. The benefits of a misplaced boundary have been reflected in their income in a large way. The resulting damage to Michigan's Conservation program is apparent.

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[25]Testimony of Joseph Hornick, R 48.
[26]Diagram No. 1 of brief.
[27]Testimony of Capt. Ellsworth, R 17-20.
Diagram No. 2, giving names and record page of Plaintiff's witnesses who admitted knowing of Michigan patrol.
[28]Testimony of Herman Leisner, Michigan Conservation Officer, R 44-47. Shows sales of non-resident licenses dropped from.
The record also discloses through the examination of the plaintiff's witnesses that a large number from the Washington Island area formerly had Michigan licenses but dropped them the last few years. (Diagram No. 1.)
[29]Testimony of Fred Seidl, R 44.

COLONEL MARTIN AND THE TRANSCRIPTIONAL ERRORS

Colonel Lawrence E. Martin, Chief of the Bureau of Maps of the Library of Congress, President of the American Association of Geographers, Ex-Professor of Wisconsin University, had been Geographical Adviser to the Wisconsin Special Counsel in the former suit and a valuable witness for both parties. It seems he was not consulted in regard to the phraseology of the decree.

Some years later in an address before the American Association of which he was president, he criticized the language of the decree extensively.[30]

Some of Colonel Martin's criticisms were academic and rather fanciful. He admitted this at the time and later on the stand in this case.

He did, however, discover and publish an error in the phraseology of the decree—one of the errors here referred to as transcriptional errors.

It appears from the present record that these *two* errors occurred in this way.

Thomas R. Hasley, City Engineer of Menominee, Michigan, a witness in the former case, had scaled off on a chart the distance from the mouth of the Menominee River to the sailing course passing west of Chamber's Island in a direct line and gave the course and distance as East by South seven and one-half miles.[31]

This course and distance was incorporated in the decree, but unfortunately the starting point used in the decree was not the mouth of the Menominee River, but a point midway between the ends of Menominee harbor piers. These piers extend about three-eighths of a mile northeasterly from the mouth of the river.

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[30] Plaintiff's Exhibit 39.
[31] Testimony of Thomas R. Hasley, R 47.
See also Defendant's Exhibit E, reproduced in record.

This transcriptional error was not discovered by Colonel Martin, but developed during the hearings of this case.

The course, to make a perfect right angle with the sailing course, should be East by South one-eighth south—the distance seven and one-eighth miles.[32]

The decree, in its general calls, defines this line as a direct line from the mouth of the Menominee to the center of the most usual ship channel. The location of the center of the ship channel is also correctly described. It is only in the technical definition of this line that error occurs.

By the paramount calls of the decree, the terminations of this line are fixed correctly and its course and length determinable.

The discrepancy becomes at once apparent upon reference to a chart.

The general rule of construction that monuments control over courses and distances results in the correct determination of the line.

The second transcriptional error consists in the inadvertent inclusion of the word "by" in the third course of the boundary in Green Bay.

The general description of the boundary in this section in the decree is "the center of the most usual ship channel of Green Bay, passing to the north of Green Island and westerly of Chamber's Island and through the Rock Island Passage into Lake Michigan by courses and distances as follows:" After the first course, discussed above, the decree continues: "thence along said ship channel north by east one-eighth east eight and seven-eighths miles".

This course and distance are correct.

The third course and distance reads "thence continu-

[32]This course and distance are determinable from the Government chart, Defendant's Exhibit E.

ing along said ship channel north *by* east seven-eighths east, twenty-seven miles".

Upon applying this description to any chart, it is at once apparent that the course is not one which continues along any ship channel and would not result in reaching the Rock Island Passage. Eliminating the word "by", the course and distance are as given on all charts for that portion of the ship channel from the sailing objective west of Chamber's Island to the Rock Island Passage.

Here again the monuments given in the general description control over the patently erroneous course.

This is the error discovered and developed by Colonel Martin.

Both of these errors are conceded by both parties to this suit. We discuss them only to show their technical nature—that they are apparent and that proper construction of the decree eliminates their effect.

The error pointed out by Colonel Martin was at once conceded by Michigan. However, by that time its correction was not the sole aim and desire of Wisconsin.

The above concession took form in this court upon the motion of Wisconsin to amend said decree. Michigan answered, conceding the error, but claiming other matters to be res adjudicata.[33]

The motion was abandoned and the present action started.

The transcriptional errors above referred to under the last title are alleged by plaintiff, conceded by defendant, and found by the Special Master—no exception has been taken to this finding.

[33]See Motion to Modify Decree-Record in former case—and Michigan's Answer to said Motion.

ISSUES IN THE PRESENT CASE

In the present action, the State of Wisconsin seeks affirmative relief against the State of Michigan.

The prayers of the bill of complaint and the evidence adduced in behalf of the plaintiff are directed toward the establishment of a boundary line which would leave the mouth of the Menominee directly for the geographic center of that portion of Green Bay between Chamber's Island and the Michigan mainland, and thereafter follow the geographic center line through the remainder of the bay and Rock Island Passage into Lake Michigan.

This line, proposed by Wisconsin, is based upon several theories.

LINE OF USER

It was alleged by the plaintiff, in its bill of complaint, that such a line had been established by user between the states, but this allegation failed of proof before the Commissioner, and the Commissioner found that no rights had been acquired in the water areas by the plaintiff, State of Wisconsin, by prescription. No exception has been taken to this finding.

GEOGRAPHIC CENTER RULE

If we understand the position of the plaintiff correctly, in its exceptions to the Master's findings, the present contention of the plaintiff is that this same line, which was urged under the bill of complaint as a line of user, is now being urged as a proper construction of the definition in the Michigan Enabling Act. That is to say, the plaintiff, State of Wisconsin, is now laying claim to this geographic center line as being the center of the ship

channel west of Chamber's Island and through Rock Island Passage.

THE "NO SHIP CHANNEL" ISSUE

In the report of the Special Master there is a specific finding that there was no ship channel in the body of Green Bay to which the language of the Act of Congress might refer.[34]

There is the further specific finding that if there was any such channel, the same cannot now be located.[35]

From these findings the Master recommends the adoption of a line similar, if not identical, with the line proposed by Wisconsin in its former proposed decree.[36]

Both plaintiff and defendant have excepted to the findings above set forth.[37]

Both parties to the case have assumed that the former findings of this court upon this subject were conclusive and no evidence was directed at these issues in the hearings in this case and no argument was had thereon before the Master.

The Special Master bases his finding,[38] that the plaintiff has a right to maintain this suit, on the above findings of error in the former determinations of this court and on the further finding that this error was consented to by the parties.

The defendant, State of Michigan, has specifically excepted to this finding of consent and alleges that there was no consent to the finding by this court that there were two ship channels in the body of Green Bay to either of which this language might refer, and that the center of that ship channel which passed west of Chamber's Island was the boundary.[39]

[34]Special Master's Report, page 31.
[35]Special Master's Report, page 33.
[36]Special Master's Report, pages 44-45. Pltfs. Exceptions pages 2-3. Nos. 1-4-5-6-7.
[37]Defendant's Sixth & Seventh Exceptions.
[38]Special Master's Report, page 25.
[39]Defendant's Third Exception.

ARGUMENT

For the purpose of convenience, the defendant proposes to divide the argument into two sub-topics, which may be labeled, one "Jurisdiction" and two, "Substantive Rights".

1. The defendant insists that this court, at this time, has no jurisdiction to reconsider its opinion and decree except for error apparent and that aside from the transcriptional errors admitted by both parties and found by the Special Master, the opinion and decree of the court must stand as final.

2. The defendant insists that the plaintiff's claim to the geographic center of the portion of Green Bay west of Chamber's Island is an improper construction of the language of the Act of Congress defining the boundary, and that it is a position inconsistent with that taken by the State of Wisconsin in the former suit.

The geographic center line proposed by Wisconsin is manifestly not the center of any ship channel, nor is it a route possible of navigation. That it does not effect an equitable division of the waters between the two states, and is a line impossible of demarcation and determination for practical purposes.

The defendant further insists that the adoption of the geographic center line now proposed by Wisconsin would amount to the granting of affirmative relief to the state of Wisconsin and would, in effect, transfer to the jurisdiction of the State of Wisconsin a water area over which Michigan was exercising jurisdiction during the period immediately preceding commencement of the other suit and up to the time of the entry of the decree and to this date, and that to grant affirmative relief to the State of Wisconsin is inconsistent with the theory of determination of the rights of the parties as adopted by the opinion of this court.

JURISDICTION

FRAUD AND MISTAKE

The plaintiff, in the bill of complaint, claimed the right to maintain this suit and to redetermine the boundary line on the theory that the decree of this court actually transferred to Michigan jurisdiction over a water area which had formerly been in the possession of Wisconsin, and that counsel for Wisconsin had consented to the entry of the decree relying upon statements of Michigan counsel and was misled.

This allegation has failed of proof through the finding that no territory, then in the possession of Wisconsin, was transferred to the jurisdiction of Michigan by the decree. It naturally follows that counsel for Wisconsin could not have been misled by counsel for Michigan upon this fact, and jurisdiction to review the former decree upon this ground has failed for lack of proof.

CONSENT DECREE

If we understand the position of counsel for plaintiff correctly, he now asserts that the court has jurisdiction to redetermine the boundary line in Green Bay in a manner not intended to be incorporated in the decree because there were transcriptional errors in the decree. That is to say, the plaintiff claims the right, because the decree was defective clerically, to amend it in substance and in respects in which it was not then intended.

We also believe that counsel for the plaintiff is relying to a certain extent upon the theory of consent. That is to say, that the court did not, in its opinion, adopt the sailing course given on the charts as being the center line of the ship channel, and that the adoption of such sailing courses was a matter of consent of counsel and that

the court, therefore, has the right at this time to reconsider its decree in this respect.

THE MASTER'S FINDINGS AS TO THE RIGHT TO MAINTAIN SUIT

The Master found that the plaintiff had a right to maintain its suit because the former decree was a consent decree and was erroneous.[40]

The Master does not find that the decree was erroneous upon any matter where the consent of the parties was involved. He finds that both parties were in error and thereby misled the court, in considering that the language of the Michigan Enabling Act applied to the center of a ship channel in the *body* of Green Bay.

This he finds to have been error,[41] and upon this error he bases the right of the plaintiff to maintain the suit beyond the correction of the transcriptional errors.

We quote from the report of the Master, page 39:

> "The action is one praying for the true location of a boundary line. In an action of this character it is the duty of the court to establish the *true* boundary line, if possible, irrespective of the assumptions or claims that may be made by the parties."

Defendant claims it was denied such benefits in the former suit.

The Master also concludes, paragraph three on page 26 of the report of the Special Master, that the issue of dominion over the water area in Green Bay as distinguish from the islands therein was not in issue in the former suit.

To this conclusion the defendant, State of Michigan, has taken exception.[42]

[40]Report of Special Master, page 25.
[41]Report of Special Master, page 38.
[42]Defendant's Fourth Exception.

It is the claim of the defendant in this respect, that the issue of dominion over the water areas was in the former case and that all evidence introduced in this case was introduced in the other case, except the claim made in this case by the State of Wisconsin that it had acquired rights by prescription, upon which claim the Master has found against the State of Wisconsin.

SUBSTANTIVE RIGHTS

PROPER CONSTRUCTION OF THE ACTS OF CONGRESS

Aside from the claim heretofore made by this defendant, that the language of the Acts of Congress has already been construed by the court in its opinion and decree in the former suit, the defendant herein insists that the construction thus placed upon the language of those acts and claimed by the defendant in this suit is a correct and proper construction of such acts.

EFFECT OF THE GEOGRAPHIC CENTER RULE

It is the position of the defendant that if the language of the Act of Congress, the center of the most usual ship channel, is to be construed to mean the geographic center of the entire water area traversed by ships, then the definition of the Act would apply to the geographic center of Green Bay and not to that portion of Green Bay west of Chamber's Island as claimed by the plaintiff in this case.

The determination that the boundary is in the portion of Green Bay west of Chamber's Island depends upon the theory that the language of the Act applies to the center of the lane of travel of ships. That there were two such lanes of travel, one east and one west of Cham-

ber's Island, and that the one west of Chamber's Island must be considered to contain the boundary because of the possession of Chamber's Island by Wisconsin. The possession of Chamber's Island by Wisconsin would have no effect upon the question under the theory of the geographic center of the entire bay since that island lies on the Wisconsin side of the geographic center of the bay.

SAILING COURSES ARE THE CENTER OF THE SHIP CHANNELS AND THE EXPEDIENT IF NOT NECESSARY TRACK OF NAVIGATION

The defendant further claims that it was the evident intent of Congress that the boundary line, from a point opposite the Menominee River, was to follow along the most usual track of navigation of vessels in 1836.

The defendant claims, in this respect, that this court, in its former opinion and decree, determined that the ship channel from the village at the foot of Green Bay passing west of Chamber's Island and through Rock Island Passage into Lake Michigan, was the most usual ship channel, and that in the decree this court determined that the sailing course given on the modern charts for passage through such ship channel is the center line of such channel.

The defendant claims that not only was this determination of the court correct, but further asserts that the following of such sailing courses is expedient, if not, in fact, necessary, in the navigation of such channel.

MICHIGAN'S POSSESSION AND THE LAW OF THE CASE

The defendant insists that irrespective of the right of the plaintiff to bring any suit on this matter at this time, that this court has already determined between the parties and as to the same territory, that neither party is entitled to any affirmative relief, and that the fact undisputed in this record, that Michigan is now and has been since a date prior to the commencement of the other suit, actually exercising jurisdiction in the area involved, is conclusive of the rights of the parties under the doctrine of the *law of the case.*

ARGUMENT

JURISDICTION IN GENERAL

The defendant takes the position generally that the entire boundary line involved in this action was involved in the former action, and that the court has no jurisdiction to reconsider its determination except for the apparent errors, or transcriptional errors, and that it is well settled law that upon a bill for review for error apparent the court will not go beyond the record and reconsider its determination of other matters.

Streets Federal Equity Practice, Vol. 2, Section 2130:

> "It follows that, upon a bill of review for error apparent, the court will not consider or correct any error resulting from an erroneous inference of fact or conclusion of evidence. The only questions open for examination in such case are such questions of law as arise on the pleadings, proceedings and decree exclusive of the evidence. Upon a bill of review

for error apparent the findings of fact of the court or chancellor on which the original decree is based are conclusive."

Streets Federal Equity Practice, Vol. 2, Section 2138:

"A defendant who waives one defense by setting up another inconsistent defense in his answer and going to trial on the issue raised by such answer cannot, on bill of review, have the benefit of the defense that he waived."

Streets Federal Equity Practice, Vol. 2, Section 2140:

"Any facts averred in bill of review inconsistent with the pleadings and decree in the main case can have no effect in determining the correctness of the decree;"

The above text cites in support thereof, the case of:

Shelton vs. *Van Kleeck*, 106 U. S., 532—27 L. ed., 269.

This case determines that upon a bill of review for errors apparent only the apparent errors may be considered and that the court will not open up a case on that ground and reconsider it upon other grounds.

To the same effect we cite the following decisions of this court:

Thompson vs. *Maxwell*, 95 U. S., 397—24 L. ed., 483.
Nickle vs. *Stewart*, 111 U. S., 776—28 L. ed., 599.
Willamette Iron Bridge Co. vs. *Hatch*, 125 U. S., 1—31 L. ed., 629.
Whiting vs. *Bank*, 13 Pet., 6—10 L. ed., 33.
Putnam vs. *Day*, 22 Wall., 60—22 L. ed., 764.

We quote as peculiarly applicable to this case, the language of Judge Severon from the opinion of the Judge:

Jourolmon vs. *Ewing,* 29 C. C. C., 41—85 Fed., 106:

"A bill of review cannot be resorted to for the purpose of further challenging the view taken by the court on facts and law of the case; for, assuming that such proceedings are appropriate in an appellate court, a bill of review for errors apparent of record will lie only upon such matter as appears in the record proper. It does not lie to correct a merely erroneous decree, resulting from a misconception of the evidence, or mere errors of deduction in reaching a conclusion thereon. If the decree is consistent with the record, and is a proper—that is to say a lawful—one, to be made upon the pleadings and proceedings in the case and the facts found, there is no sufficient foundation for a bill of review for errors of record. The testimony cannot be regarded for this purpose."

In the instant case the error apparent claimed by the plaintiff (referred to herein as transcriptional error) is admitted by the defendant, is found by the Special Master, and these finding have not been excepted to by either party.

There is, therefore, nothing before this court for determination in that respect, except the means and method of correcting these admitted errors and the rights of the parties, so far as they involve correction of these transcriptional errors, terminate upon their correction, and the *existence of these transcriptional errors is not a ground for reconsideration of other matters involved in the decree.*

It is true that it has been held that a bill of review for

error apparent may be joined with a bill of review for newly discovered evidence.

Ricker vs. *Powell,* 100 U. S., 109—25 L. ed., 527.

The opinion in this case clearly recognizes that while the bill may be filed upon two grounds, the right to relief upon either ground is independent and subject to its own rules and construction.

We conclude, therefore, that the plaintiff's right to maintain this suit for error apparent upon the face of the decree is limited to the correction of such apparent errors, and that any modification of the decree, other than as admitted, must be based upon a right to file a bill of review for fraud, mistake, and excusable ignorance, based on newly discovered evidence as alleged in the bill.

CONSENT DECREE

The Special Master, in his findings on pages 25 and 26 of his report, cites the defendant as conceding that an erroneous decree resulting from the consent of the parties is not res judicata, and cites other authorities including this court in support of that proposition, which we believe is fundamentally correct.

However, in the instant case, while the Master finds the decree to have been a consent decree and to be erroneous, he does not find that the error results from the consent, but rather finds that both parties and the court were in error in assuming a fact from the evidence in that case, which the Master finds, did not exist.

To elaborate upon this proposition, the Master's finding that the decree is erroneous is based on his finding that the language of the Act of Congress did not apply

to a ship channel in the body of Green Bay, because there was no such ship channel.

In the other case there is a great volume of evidence in the record to the effect that there were two ship channels in the body of Green Bay, to either of which the language of the Act of Congress might apply. Both parties to the case, in their arguments and briefs, assumed that one or the other of these ship channels was the one referred to, and this court made specific findings in its opinion to the effect that there were two such ship channels to which such language might apply and determined which one contained the boundary.

It seems to us perfectly apparent that this was not a matter of consent of parties, but was a conclusion upon which the parties did not disagree, and which was arrived at by both parties and by the court from the evidence in the case.

It likewise appears to us that the Master's finding that the language did not apply to a ship channel in the body of Green Bay is entirely unsupported by the record in the present case. Neither party to this case made any such claim in its pleadings, briefs, nor arguments, nor was any evidence introduced tending to prove such a situation. Both parties to this suit have deemed that the former findings of this court in this respect were final and both parties have excepted to this finding by the Special Master.

The defendant, therefore, urges that not only is the Master's finding of error in this respect unsupported, but further, that his finding that the plaintiff may maintain this suit because the decree is a consent decree and erroneous, is beyond the rule that an erroneous decree *resulting* from the consent of the parties is open for review.

It is the claim of Michigan that the determination of

this court, in its opinion, (page 315) is the law of this case. This court said, in no uncertain language:

> "The evidence shows that there are two distinct ship channels, to either of which this description might apply."

There is no question but what the court in making this statement was referring to the two ship channels in the body of Green Bay, one east and one west of Chamber's Island.

There is not the slightest indication that this finding was the result of consent of parties, and as a matter of fact, there is no proof that it was erroneous, but an abundance of proof that the finding was correct.

The opinion, on pages 315-316, comments on the evidence of the existence of these channels and their use. There was no new evidence upon this point adduced before the Special Master in this case.

MASTER'S CONSTRUCTION OF CONGRESSIONAL ACTS

In spite of the fact that the Act of Congress was plainly and correctly construed by this court in its opinion and decree, the Master has found error in this regard.

The findings of the Master are based on several violent assumptions not supported by the record and, in fact, untrue.

Construction of the Michigan Enabling Act is made to depend on the intent of Congress at the time of passage of the Wisconsin Territorial Act.

The language of the Michigan Enabling Act is not ambiguous. It plainly refers "to the center of the most usual ship channel of the Green Bay of Lake Michigan;

thence through the center of the most usual ship channel of the said bay. . . "

This Act was passed in January, 1837, and constituted a grant by Congress to Michigan.

The Wisconsin Territorial Act was passed nearly a year before and the description was in the reverse order and not as definite. It was not a grant of statehood. This issue was presented by Wisconsin in the old case.[45]

The record in the old case discloses many maps showing ship channels "in the body of Green Bay", some of which maps were available to Congress at the time of passage of the Michigan Act.

Immediately after its passage, a report by Captain Cram contained a map delineating such channels *in the body of Green Bay,* one east and one west of Chamber's Island, just as later found by this court in its opinion.

Ten years later, Wisconsin received its grant from Congress with the Michigan boundary as its statehood limit.

The boundaries described in the Territorial Act were temporary and any indefiniteness there found is no criterion for altering the plain language of the Michigan Enabling Act.

Soon after the adoption of the Michigan Act, Captain Cram reported:

> "It is a well-known fact to all who have any personal knowledge of the navigation of this bay, that there are at least two ship channels which are in use by all classes and kinds of craft that navigate the Great Lakes."

The captain submitted a sketch map depicting these two channels. (R. 99.)

The two channels thus depicted have, through accurate

[45]See Wisconsin's brief in old case, pages 49-50, et seq.

surveys and soundings, become the sailing courses on the modern charts.

This court, in its opinion and decree, adopted the western as the most usual for the reasons there given.

The Master now finds that there was no such ship channel or that its location cannot now be determined.

The claims of the plaintiff, Wisconsin, in this case, depend upon the Wisconsin Statehood Act since the Master has found that no title by prescription was acquired by either party over the water areas.

There can be no question but what Congress had before it the reports of Cram before the passage of the Wisconsin Act.

The language of the Michigan Act plainly conducts the boundary to and through the ship channel in Green Bay.

The engineers' report clearly shows the existence of two such channels. This fact was apparently known to Congress, hence the selective words "most usual ship channel."

We do not know how deeply the Special Master delved into the record in the old case. It is apparent from some references in his report that he went beyond the record in this case.

He evidently did not study all the evidence and exhibits of the former suit or he would not have made the comment in regard to vessel travel in 1836, found on page 31, of his report.

At that time nearly all water borne traffic originated or had its destination at the settlement now the City of Green Bay. The entrances to the bay in common use were Rock Island Passage and Death's Door. Between these extremeties the channel to be followed lay east or west of the Chamber's island group. The courses pursued passed as directly as possible from one objective to another. A regular line of steamships was on the run

from Buffalo, New York, to Green Bay. Lead from Wisconsin mines was brought up the Fox River and reshipped at Green Bay.

A lighthouse had been established at one of the entrances to the bay and pilots were engaged in conducting vessels through the bay to the settlement at its foot. A Geodetic survey was made soon after the admission of Michigan to furnish more definite information as to the depth and breadth of these channels.

The only possible way for a vessel to avoid hidden reefs or navigate at night is to pursue a known course from a known point. The latitude of departure from this known course is determined by the breadth of channel at various points, but nevertheless the known course between objectives is the center of the channel.

This was particularly true of night navigation before the establishment of lighthouses.

The sailing directions in evidence in the former case gave courses and distances for passage through these two ship channels. With slight variations due to better information, they are the same as on the modern charts.[44]

It seems scarcely necessary to argue that Congress incorporated the words "center of the most usual ship channel" as descriptive of a line which could be determined by the factors employed.

Through geodetic surveys this government has established and mapped these channels and marked thereon the course to pursue in navigating them.

These maps or charts were in evidence in the old case and no one undertook to dispute the manifest fact that the sailing courses given on the charts conformed to the description "center of the ship channel" the only serious issue was as to which ship channel contained the boundary.

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[44]See argument and annotations "Sailing Courses etc" page 61 this brief.

The issue as to the existence and location of these two ship channels "in the body of Green Bay" was not recognized as in the present case by either party.

There is, nevertheless, abundant proof thereof in the present record. Nearly all of the hundred-odd witnesses sworn on the issue of possession and jurisdiction referred to one or another of the channels and the sailing courses through them.

Most of this testimony was given in reference to maps or charts upon which the "passages" or channels are named and the sailing courses or center lines depicted with courses and distances.

Several of these charts are in evidence here.

The extent of use of the rival channels was not litigated here because rendered unimportant by the opinion.

If that opinion is to stand at all it must uphold the existence of a center line of a ship channel west of Chamber's Island and north of Rock Island.

The Special Master does not cite us to any testimony or exhibit as tending to disprove the existence of the ship channels referred to in the opinion.

The Special Master makes no attempt to square his findings with the doctrine of the former case.

The Special Master's recommendations disturb the status as to sovereignty.

Out of the confusion arising from the injection of an issue not presented or even suspected by the parties, there still stands forth this guiding principle of determination.

No matter upon what theory the claims of either party to this triangular area be presented or considered, there is still the inviolate rule that the status as to sovereignty at the time of the decree must be maintained.

In this suit both parties strained to the limit to produce

proofs of sovereign acts and exercise of possession over this area.

The only proof of acts of sovereignty was the proof that Michigan Conservation Officers patrolled this area from 1912 on and enforced the Michigan fishing laws with some, if not complete success.[45]

The Master has found specifically that neither party acquired any rights by prescription. There is evidence that fishermen from either state used these waters with or without licenses from one or both.

There was, however, a growing respect for Michigan law enforcement in the area as shown by the purchase of Michigan licenses by Wisconsin residents.[46]

There is no proof of purchase of Wisconsin licenses by Michigan fishermen.

The existence of the patrol is not disputed and it was known to most of the Wisconsin fishermen who became witnesses in this case.[47]

The status of the triangle as to sovereignty at and previous to the time of the former suit is determined by this clearly established fact.

If the triangle be given to Wisconsin, the Michigan patrol must cease and the citizens of Michigan lawfully engaged in fishing in this area must cease operations or buy Wisconsin licenses.

As to the Wisconsin fishermen accustomed to fishing in this area, they may continue on the same basis as heretofore—that they successfully avoid the Michigan patrols or purchase Michigan licenses.

The testimony of Capt. Ellsworth and Herman Leisner, with the admissions of Mr. Goodmander,[48] indicate that many of these men were intentional violators, perhaps all who didn't have licenses.

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[45]Testimony of Capt. Ellsworth, R 17-24.
[46]Testimony of Herman Leiser, R 44-47.
[47]Diagram No. 2 ante.
[48]Testimony of Albert Goodmander, R 27-30.

Officer Hornick testified that so far as he could learn, the 200 Menekaune residents ejected from the triangle in 1929 were there without licenses from either state.[49]

Their claim of possession lacks bona fides when their acts were contrary to the laws of their own jurisdiction.

Surely this patrol was possession by Michigan adverse to any claim by Wisconsin under color of title.

This court, in its opinion, recognized that possession under color of title only, could not be extended to include area actually in the possession of another.

If, as the Special Master concludes, the Acts of Congress be so construed as to include this triangle in Wisconsin, then the whole theory of the opinion and decree fall upon the same claim urged by Michigan in the Menominee River sector in the former suit.

Possession by Michigan of any area belonging to Wisconsin is inconsistent with the doctrine of acquiescence.

The granting of this area to Wisconsin at the time of the decree would have constituted affirmative relief not contemplated by the opinion.

This situation was fully apparent to Wisconsin counsel at the time of entry of decree—it remains unchanged.

Wisconsin's claim that it had possessed this triangle and Michigan had not, has not only failed of proof but brought forth proof of the exercise of sovereign jurisdiction in this area by Michigan.

The fact is that awarding this triangle to Michigan was consistent with the opinion, not inconsistent as alleged.

To award it to Wisconsin on bill of review would be to change the existing status as to sovereignty and to permit Wisconsin to prevail on both of two inconsistent theories.

Conceding for the purpose of argument, that the Master's interpretation of the Acts of Congress is right; and a proper subject of review; we then have the identi-

[49]Testimony of Joseph Hornick, R 48.

cal situation with which the court was concerned in the Menominee River sector—possession by Michigan of Sugar Island.

In the words of Justice Sutherland, either the decree must be so drawn as to construe the grant without disturbing the existing status, or the entire case must be reopened.

The Special Master evidently did not consider this evidence of sovereignty by Michigan in its relation to the guiding principle of status quo.

WHAT WAS CONSENTED TO

It is the position of this defendant in this case that the decree of this court was not a consent decree in any sense, except insofar as counsel for Wisconsin consented to the definition of the line in Green Bay as not disturbing the status of the parties as to sovereignty.

It fairly appears from the record in this case that at the time of the settlement of the decree, the State of Wisconsin was attempting, by its proposed decree, to acquire jurisdiction over two areas then in the possession of Michigan.

The records show that both of these areas are involved in the present suit.

The land area there known as Sugar Island has been eliminated from this case by the findings of the Special Master not excepted to.

The water area there involved, the triangle opposite the City of Menominee, is directly in issue in this case and the recommendation of the Special Master is to the effect that jurisdiction over that area be now given to Wisconsin, although the Master has found that Wisconsin did not acquire title to that triangle by prescription.

The claim of the plaintiff in this case is identical with

that made before this court in its proposed decree, except that the plaintiff is now claiming jurisdiction over a larger water area.

Mr. Justice Sutherland interpreted the opinion of this court to counsel for the respective parties at the time of settlement of the decree.

He stated that the decree must be so drawn as not to disturb the existing status as to sovereignty—that unless it could be so drawn, the entire case would have to be reopened.

Let us bear in mind that the present issue—the triangular area of water—was the issue at that time. The record in the former case discloses that the parties were in agreement upon the terms of the proposed decree, except for this triangular water area and Sugar Island.

Mr. Reiser, special counsel for Wisconsin, explains his approval of the decree.

Referring to Sugar Island, he testified, (R. 9):

> Q. And it was your impression that the wording of the decree awarding the island to Michigan would not disturb such possession?
>
> A. Yes.
>
> Q. That is based upon the Michigan exhibit?
>
> A. Based upon the Michigan exhibit and the universal knowledge that Michigan had had that island. There was no question about that.

Referring to the Green Bay Sector, R. 17:

> A. . . . *the court had already instructed us, Mr. Bieberstein, to define a boundary which followed the boundary or which followed the territory over which each State had exercised jurisdiction previously. That was the court's instruction, so that we should agree upon that, and unless we did it would have to reopen the case.* For that reason we went out in an

effort to define such a boundary, and whether Mr. Sawyer said "in this area" or "this part of the Bay, Wisconsin exercised no jurisdiction but here they did," I would not say, and I don't think he did, but I think each party, at least I went into the conference with the thought that we would settle upon that basis, and when the definition was given I assumed that was the result we had arrived at; and another reason for feeling that way about it now is the fact that *there was no evidence directly in the record as to any ancient rights or authority rights being exercised in the triangular area outside of the Menominee mouth.* I would not say Mr. Sawyer said Wisconsin exercised no jurisdiction in there and Michigan did.

Q. Did you have any information as to what point Wisconsin exercised jurisdiction?

A. There was no evidence in the record at that time, *and there was none available at that time.*

It thus clearly appears that Mr. Reiser did not consent to incorporation of the definition of the boundary in the decree relying on any representations on the part of Michigan counsel, that this line had been established as a jurisdictional line. Mr. Reiser accepted the definition as complying with the court's findings and its opinion, and as being the line defined by the Michigan Enabling Act, so construed, upon assurances from Michigan counsel that such line would *not disturb the existing status as to sovereignty.*

The description incorporated in the decree for this area is the one theretofore proposed by Michigan in its printed motion. The basis for Michigan's claim is clearly set forth. Michigan claimed the line of the decree under the Act of Congress as construed by the opinion. Michigan asserted that such a line so defined had not been *altered by user.*

This, of course, amounts to a statement that adoption

of this line would not disturb the status as to sovereignty. It is now conceded that the status was not disturbed by the decree. It would be if Wisconsin prevails in this action.

Mr. Reiser, in his testimony, exonerates Michigan counsel from any positive statement that the line of the decree was a line of jurisdiction and explains the situation that counsel for both parties were attempting to arrive at a definition of a line which would not disturb the status of the parties as to sovereignty. This was done in accord with the instructions of Mr. Justice Sutherland, and Mr. Reiser assumed that it had been accomplished by the definition in the decree, and the record now shows that it was in fact accomplished, and that the decree did not disturb the status of the parties as to sovereignty.

It clearly appears from Mr. Reiser's testimony that he understood the claims being made by Michigan in relation to the boundary in Green Bay.

Mr. Reiser had first suggested that the dotted lines on the charts, the sailing courses, were the center line of the ship channels.

Mr. Reiser did not disagree with the construction of the language of the Act of Congress proposed by Michigan, that the line on entering Green Bay at the mouth of the Menominee should pass directly to the shipping course lengthwise of the bay passing west of Chamber's Island. He understood that this claim was based on the theory that there was in 1836 no shipping out of the Menominee River. (Record page 12.)

He states (R. 17): "That was a fact that we had practically conceded."

On cross-examination he says that at the time of the settlement of this decree, counsel were discussing the tri-

angular area of water shown on Exhibit E hereto attached, and that the triangle was formed by the line adopted by the decree and the sailing course Southwest three-eighths West, eleven miles, between Chamber's Island objective and Menominee River objective (R. 16).

(R. 14) Mr. Reiser understood that the adoption of the line of the decree conformed to the Judge's instructions. He states that his understanding on this went to the extent that there had been no exercise of jurisdiction by Wisconsin above that line, or sovereignty, or recognition of sovereignty.

> "That was my impression that that was the fact. In other words, the record showed that was the situation as it stood at that time."

Mr. Reiser again said in this respect (R. 13):

> "Another reason for feeling that way about it now is the fact that there was no evidence directly in the record as to any ancient rights or authority rights being exercised in the triangular area outside of the Menominee mouth. I would not say Mr. Sawyer said Wisconsin exercised no jurisdiction in there and Michigan did.
>
> " . . . There was no evidence in the record at that time, and there was none available at that time."

We believe it fairly appears from the record that the matters in issue between the parties were determined by the court in the language of Mr. Justice Sutherland that if Wisconsin was claiminng anything which it had not had, and it could not be settled, the case would have to be reopened, and that it was the intention of the court not to disturb the status of either party as to sovereignty.

From the facts as they appeared in the record at that time, this ruling controlled not only as to the Sugar

Island area, but as to the triangular area opposite the mouth of the Menominee River.

The court had adopted the center of the ship channel west of Chamber's Island as the course of the boundary from the Menominee River northward. Michigan was asserting that this ship channel did not enter the mouth of the Menominee River and that the boundary must proceed from the mouth of the Menominee River directly to the center line of this ship channel along the perpendicular. It was not a matter of consent, except to the extent that Mr. Reiser consented to the exact language used in defining the line.

Wisconsin was before the court claiming jurisdiction over this triangular area of water and its claim was denied on the basis that Wisconsin could not have affirmative relief under the opinion in the case. Upon the denial of that claim counsel, together, formulated a decree to carry into effect the result of that determination. In so doing, certain transcriptional errors occurred, but there was no error of substance.

It was the intention of the court at that time that the triangular area of water was to remain under Michigan jurisdiction and this the decree accomplished.

In the former case, upon the filing of the bill of complaint, the defendant, State of Wisconsin, made a motion to dismiss, which was argued before and determined by the court. The motion was based upon the defense of acquiescense and the court determined that the applicability of that defense depended upon the facts and denied the motion and left the matter for hearing before a Special Master.

In the present case, upon the filing of the bill of complaint, a motion to dismiss would have been proper, except for the allegations in the bill of complaint that the State of Wisconsin had been misled and the jurisdiction

over an area formerly possessed by Wisconsin had been transferred to Michigan by the decree.

Such allegations, if true, entitled the plaintiff, Wisconsin, to relief. The truth of such allegations was a question of fact and Michigan, therefore, did not in this case make a motion to dismiss.

At the present time, the defendant, State of Michigan, stands before the court fortified by the findings of the Special Master that no territory formerly under the jurisdiction of Wisconsin was transferred to the jurisdiction of Michigan by the decree.

The Master has not made any direct finding upon the question of Wisconsin having been misled, but it is a necessary inference from the finding last above quoted that Wisconsin could not have been misled in that respect since the fact in regard to which it claimed to have been misled, did not exist. It is the defendant's claim that proof of the alleged fact that territory over which Wisconsin had exercised jurisdiction had been transferred to Michigan by the decree is essential to the jurisdiction of this court to review its decree other than upon the transcriptional errors.

It is our claim that this allegation failed of proof, that the Special Master specifically found against it, and that no exception has been taken to this finding.

PLAINTIFF'S RIGHT TO AFFIRMATIVE RELIEF

It appears conclusively that this court, speaking through Mr. Justice Sutherland, interpreted its own opinion in the former case denying affirmative relief to either party.

It is entirely inconsistent that the State of Wisconsin might bar the State of Michigan from consideration of its rights to property in the possession of Wisconsin on

the theory of acquiescence in a boundary line and then ten or twelve years later proceed against Michigan to recover an area in the possession of Michigan on the theory that the line was not acquiesced in.

There can be no doubt from the record in this case that the State of Michigan, through its Conservation officers, was enforcing its jurisdiction in the area involved in this suit. We have the testimony of one Michigan Conservation official who was in charge of one of the patrol boats which visited the area once or twice a year for ten or twelve years. He interpreted the definition of the boundary as given in the Michigan constitution exactly as it was interpreted by this court in its decree and he patrolled that line and other patrols had been in the area, although he did not know what their conception of the line was.[50]

It is manifest from the record in this case that a great majority of Wisconsin fishermen who fished in this area did so under Michigan licenses.[51]

Other Wisconsin fishermen had many encounters with the wardens. Almost all of them knew of the fact that this area was being patrolled by Michigan wardens and many of those who did not have Michigan licenses admitted they knew their operations were illegal.[52]

It is very significant that immediately upon the making of the Gentlemen's Agrement[53] not to enforce the license laws along this boundary, that nearly ninety (90%) per cent of the Wisconsin fishermen who had formerly purchased Michigan licenses discontinued such purchase.

The entry of a decree by this court at this time giving to the State of Wisconsin jurisdiction over the triangular area, or any other water area north and west of the

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[50]Testimony of Capt. Ellsworth, R 17-24.
[51]See Diagram No. 1 of this brief.
[52]See Diagram No. 2 of this brief.
[53]This agreement is referred to in the bill of complaint. Testimony of Joseph Hornick, R 48.

red line of the map, Exhibit A, would interfere with the exercise of jurisdiction over that area by Michigan Conservation officials, and would to that extent constitute affirmative relief and effect a change of status of the parties. This is exactly what Mr. Justice Sutherland said might not be done.

It is just as good an answer to the claims made by Wisconsin today as it was to the claim being made by Wisconsin in its proposed decree at the time of the entry of the decree when the entire matter was fresh in the mind of Mr. Justice Sutherland, who announced the opinion of this court.

THE ISSUE IN GREEN BAY IN 1926

The Special Master has found that dominion over the water area in Green Bay as distinguished from the islands therein, was not directly in issue in the former suit.[54]

The defendant has excepted to this finding and insists that the issue of dominion over the water area and the precise location of the boundary in Green Bay was in issue in the former case and was determined by this court.[55]

In the bill of complaint filed by Michigan in the original case, on page 28 thereof, Michigan specifically alleges that Wisconsin has possessed itself of and exercised sovereignty over a large part of the waters of Green Bay that were within the grant to the State of Michigan, and this allegation is specifically denied by Wisconsin in its answer on page 12 thereof.

Counsel for Wisconsin state that they have searched the record in the former case and that it is silent as to

[54]Report of Special Master, page 28.
[55]Defendant's Fourth Exception.

the precise location of the boundary line claimed by either party.

In some of the first testimony in the case given by Thomas R. Hasley, Civil Engineer, beginning on page 62 of the original record and referring to proposed Exhibit 106, (became Exhibit 115 in old case) this engineer gave the courses and distances of the sailing courses of the two rival ship channels. These became the respective claims of the parties as to the location of the boundary. The sailing course is specifically suggested by Wisconsin on page 253 of its brief in that case.

In following through this testimony, the course given by Mr. Hasley for the Michigan claim is a course practically east from the mouth of the Menominee River to the sailing course on the easterly side of the bay, and the sailing course given as the Wisconsin claim is given from a point outside of Green Bay harbor.

We have seen that Wisconsin was asserting the claim that the ship channel from Green Bay passing westerly of Chamber's Island and through Rock Island Passage into Lake Michigan, from a point opposite the Menominee River, was the most usual ship channel referred to in the Act of Congress, and that it alleged the center of said channel to be approximately the dottled line, the sailing course given on the charts in evidence.[56]

The record is silent as to what the claims of Wisconsin were as to the boundary between the mouth of the Menominee River and the center of this channel prior to its proposed decree.[57]

The Michigan claim, that the boundary pass due east to the *eastern* channel, was denied by the court in its opinion.

Wisconsin, in its proposed decree, attempted to include the triangle of water opposite the City of Menominee in

[56]Wisconsin's brief, old case, page 253. Also sketch R 19.
[57]Wisconsin's proposed decree in record, former case.

Wisconsin, describing the line following the sailing course from Rock Island Passage to the point west of Chamber's Island and thence directly into the Menominee River.[57]

This proposal by Wisconsin was objected to by Michigan.[58] Michigan stated that the Wisconsin decree was in reverse order to the language of the grant and that as a result thereof, Michigan would be *deprived* of jurisdiction over an area of considerable extent in the waters of Green Bay. (Exhibit L, see Objection No. 1.)

In the argument and brief supporting that objection, this area is defined as "the triangle in the waters of Green Bay lying between the lines of a direct water course from Menominee harbor to the sailing objective opposite Chamber's Island light, and a course from Menominee harbor to the most usual ship channel of Green Bay, and along that channel to the same sailing objective".

Michigan's claims to this triangular area are set forth as follows:[59]

> "The language of the Michigan Enabling Act . . . is the basis for Michigan's claim. This language is the effective grant *never having been altered by enactment or use.* Michigan claims for it a *construction* that the line upon entering Green Bay at the mouth of the Menominee shall pass in a direct course to the middle of the most usual ship channel of Green Bay. . . . Viewed in the light of shipping at the time of the admission of both states, as shown by the record, there can be no question but what the 'most usual ship channel of Green Bay' was on the course extending lengthwise of the bay and as shown as the charted course by plaintiff's exhibit 106. . . . Plaintiff, therefore, asks that the boundary from

[57]Michigan's objections and proposed amendments with argument and brief are Exhibit L of this case—also found in record of old case.
[58]Defendant's Exhibit L.

Menominee harbor pass along a line at right angles to this western channel course of the Green Bay as given on the charts, and thence along the charted course."

It was in connection with these objections that a motion to amend the proposed decree was made by Michigan, and it is in the technical description in the printed copy of this motion to amend that the errors discussed as transcriptional errors first appear. It is probable that these errors were carried into the decree from this source.

In this connection it is interesting to note that the exact language of this proposed amended decree was adopted as to the *technical description* of the boundary line in Green Bay, but that there was included ahead of the technical description a *general description* of the boundary in Green Bay which was not a part of Michigan's proposed amendments.

In other words, the general calls of the boundary in Green Bay, as set forth in the decree, were not proposed by Michigan, but were determined from the opinion by Mr. Justice Sutherland, and the technical description only is the portion which was agreed upon by counsel.

Mr. Reiser, in his testimony, on page 23, was not sure as to how these courses and distances were fixed upon and refers to a map produced by Mr. Sawyer, which he says may have been an exhibit in the case.

It is also interesting to note that the technical legal descriptions at that time incorporated in the decree to define the land known as "Sugar Island", were furnished by Mr. Reiser, whose best recollection is, he obtained them from the City Engineer of Marinette by telephone or telegraph.

These descriptions were not a part of Michigan's pro-

posed amendments nor the original proposed decree, but were evidently incorporated at the suggestion of Wisconsin to make the Michigan proposed amendments more definite.

The error in regard to these descriptions is academic only. It now appears that the land known as Sugar Island, an accurate survey of which appears in the record in this case,[60] is partly within and partly without the Michigan Public Survey referred to.

The land referred to in the report of the Special Master and the briefs in this case as "grassy island" was all considered as under the general descriptive term "Sugar Island" in the former case; the term "grassy island" has been applied in this case because the witness, Colonel Martin, discovered that terminology on one or two old maps.

In the examination of Mr. Hasley,[61] it appears that he had, for the purpose of describing this land for tax purposes, extended the lot lines across the meander line and described the land as being included in the adjoining parcels of the Public Survey, and he understood that was the custom in such cases.

We have three admitted errors in the case; two in the courses and distances given in the decree in the Green Bay section, and one, the inclusion of land outside of the Public Survey of Michigan as being within the Public Survey. None of these errors have to do with the general definition of the boundary contained in the decree, and if we accept the general definition of the boundary in the decree we find that the instructions of Justice Sutherland, that the status of the parties as to sovereignty was not to be disturbed, have been carried out.

The source of these admitted errors is determined and

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[60]Defendant's Exhibit I.
[61]Testimony of Thomas R. Hasley, R. 47-48.

correction is simple. In fact, in each instance the error is such that it may be called a patent error determinable from the face of the decree. As to these errors, it may well be said that they crept into the decree through consent and through mutual mistake. There is no question of the jurisdiction of this court to correct them or to so construe them judicially as to clarify the situation.

COLOR OF TITLE

It is further the position of the defendant that the issue of dominion over the water area in Green Bay was involved in the former suit in the determination by this court that possession of the islands in the bay by Wisconsin under color of title describing its boundary as the middle of the most usual ship channel, was extended over the water area between the islands and the center of such ship channel in the absence of actual adverse possession by Michigan.

This principle of law was referred to by the court in its opinion[62] and is a necessary inference to be incorporated in the logic propounded by the court in its determination of the boundary in Green Bay.

Unless the court's determination is based upon this theory, Michigan might well argue that the water between Chamber's Island and Door County Peninsula is still Michigan.

We conclude that the issue of dominion over the water area in Green Bay was raised by the pleadings, covered by the proofs, the claims of respective parties were set forth in their briefs, the matter was determined by the court in its opinion and incorporated in the decree in no uncertain language, except for the transcriptional errors.

[62]Opinion, 270 U. S., 313.

SUBSTANTIVE RIGHTS

PROPER CONSTRUCTION OF THE ACTS OF CONGRESS

The language of the Act of Congress, the Michigan Enabling Act, gives three specific directions for the location of the boundary in the area in Green Bay aside from other inferences to be drawn from the language.

These three specific directions are as follows:

1. Down the center of the main channel of the same, (the Menominee River), to the center of the most usual ship channel of the Green Bay of Lake Michigan;

2. Thence through the center of the most usual ship channel of the said bay;

3. To the middle of Lake Michigan.

We have two definitely fixed points in the boundary, the mouth of the Menominee, and the middle of Lake Michigan.

From the first mentioned point the boundary is to pass *to* the center of the most usual ship channel and thence along that ship channel to the terminus.

It is significant that in the same paragraph Congress used the words "main channel" in reference to the boundary through the channels of the river, but changed the language and used the words "center of the most usual ship channel of said bay" in describing the boundary in Green Bay.

It was the claim of both parties in the other suit and stands uncontroverted in this suit that at the time of the passage of said act, the only considerable vessel movement in the region was the carrying of freight and passengers between the Village at the south end of Green

Bay, now the City of Green Bay, and the entrance to the bay and thence to lake ports.[68]

The evidence in the other case clearly showed that from a point opposite the Menominee River southward, this vessel travel was along a lane to the eastward of Green Island, but that from a point opposite the Menominee northward there was a choice between two lanes, one passing just westerly of Chamber's Island and the other one passing close to the Wisconsin shore.

The opinion in the former case adopts the channel west of Chamber's Island as the boundary, and up to the time of the settlement of the decree no specific claim had been made by Wisconsin as to the location of the boundary between the mouth of the Menominee and this lane of ship travel.

At the time of the settlement of the decree in the former case, the State of Wisconsin proposed a boundary direct from the mouth of the Menominee River to the sailing objective two miles west of Chamber's Island which is in the center of that lane of travel but at a point not opposite the mouth of the Menominee but several miles to the north thereof. The State of Michigan, on the other hand, insisted that the boundary should pass directly from the mouth of the Menominee to the center line of this lane of ship travel and thence along that line, basing its position in that respect squarely upon the language of the Act of Congress.

There are now two arguments advanced against this theory, which was adopted by the court in its decree.

The Special Master has concluded that this was error and that the language of the Act of Congress did not refer to any ship channel in the body of Green Bay, but

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[68]Testimony of Robert M. Reiser, R 13. Also R 17. Defendants' Brief former case, page 22.

rather only to the channels at the entrance thereof. This question we have dealt with elsewhere.[64]

The plaintiff in this case, the State of Wisconsin, now claims that the language of the Act of Congress referred to the geographic center of the ship channel west of Chamber's Island and not to the center of the lane of vessel travel.

We believe that the position of the State of Michigan, advanced at the time of the settlement of the decree in the former case and adopted by the court in the decree, is correct.

We believe the most potent answer to both the above arguments lies in the fact that had Congress not intended to refer to a ship channel in the body of Green Bay they would not have used the language "thence through the middle of the most usual ship channel of said bay", and that had Congress intended that the boundary were to follow the *geographic* center, it would have been a simple matter to say so.

We believe it is a necessary inference from the language of the Act of Congress that Congress knew there was more than one ship channel, hence the selective words "most usual".

We believe it is likewise apparent that Congress in using the words "center of the most usual ship channel" had in mind the fact that hydrographic surveys of this area were going forward and that by means of these hydrographic surveys the center of the most usual ship channel would be determined just as it was determined and submitted in evidence in the case.

The factors referred to in the Congressional Act for the determination of the boundary are the identical factors which influenced the hydrographic survey office in locating the sailing courses on the charts, and we believe

[64] Page 19 of this brief.

that the adoption of these sailing courses as the center of the most usual ship channel was a natural and logical sequence.

EFFECT OF THE GEOGRAPHIC CENTER RULE

The position of the State of Wisconsin in this case at this time is wholly inconsistent with the position taken in the former case.

The language of the Act of Congress does not refer to the middle of the most usual ship channel west of Chamber's Island, but to the middle of the most usual ship channel in Green Bay.

In the former case the State of Wisconsin insisted that there were two ship channels in this portion of the bay and that the possession of the islands between the ship channels by Wisconsin was the determining factor as to which was the most usual, and this theory was accepted by the court and incorporated in its opinion.

If at that time the State of Wisconsin urged the geographic center rule now being urged, the existence of the two ship channels would have been unimportant because the geographic center line of the bay passes west of Chamber's Island, and the possession of Chamber's Island by Wisconsin would have been in full accord with the adoption of the geographic center rule of Green Bay as the boundary and not the geographic center of that portion of the bay west of Chamber's Island.

To permit the State of Wisconsin to maintain its present position requires advancement over two inconsistent claims. The boundary is first shifted to the area west of Chamber's Island on the theory that there are two lanes of vessel travel which were referred to in the act, and it is then shifted farther west, to the geographic

center of the water area west of Chamber's Island on the theory that the Act did not refer to lanes of vessel travel at all.

If the geographic center rule is to be adopted and applied to the language of the Act of Congress, then the geographic center of Green Bay should be the boundary from a point opposite the Menominee River northward, since the possession of Chamber's Island could have no effect in determining this portion of the boundary as it lies well within Wisconsin territory under that theory.

The adoption of the rule would, in fact, give to Michigan jurisdiction over a greater water area than it claims in this section of the bay. While it might well be argued to be an equitable division of the water of the bay to pass out directly from the mouth of the Menominee to the geographic center line of the bay and thence along the geographic center line to a point opposite Rock Island Passage, such a boundary would not be nearly as satisfactory because it is not so readily determined as the sailing courses which appear on all charts and afford means of ready determination upon the waters.

We revert to our former argument that such a boundary, had it been intended by Congress, would have been easy of definition, and it is evident from the language of the act that Congress intended otherwise.

SAILING COURSES ARE THE CENTER OF THE SHIP CHANNELS AND THE EXPEDIENT IF NOT NECESSARY TRACK OF NAVIGATION

The Congress of the United States which defined this boundary line, also provided for the survey of the area through which it passed, and the mapping thereof by the Hydrographic Office.

It is further provided that such maps when completed

are published and circulated for the use of the interested public. Upon these maps appear dotted lines commonly known as sailing courses with direction and distance marked thereon. These lines are placed on the map to indicate the most desirable course in navigating the channels through which they pass.

It appeared in the record in the old case and can be gathered from the briefs of both parties, that the admission of Michigan to the Union came at the end of a four year dispute between the State of Ohio and the Territory of Michigan, which dispute reached such proportions that it became known as the Toledo War.

During all of this time, the question of the boundaries of Michigan was before Congress and the fight was most active in the Senate Judiciary Committee until the 24th Congress, 1st Session in 1836. Then, by the special message from the President, a Select Committee was appointed to consider the matter.

Senator Clayton was Chairman of the Judiciary Committee and was a member of the Select Committee, and no doubt had to do with the framing of the bill, S. 177, which finally became the Michigan Enabling Act, carrying with it the description of the boundary in the same form as reported out by the Select Committee of the Senate.

In the record in the present case, we have shown that Senator Clayton continued to be interested in the matter.

After the report of Captain Cram to the effect that there were several channels in the body of Green Bay, any of which might be the most usual ship channel referred to in the language of the act, several bills were introduced by Michigan representatives in Congress in the attempt to clarify the situation. Such a bill was introduced by Mr. Porter, U. S. Senator of Michigan

27th Congress, 3rd Session, and passed through the Judiciary Committee of which Senator Clayton was a member, and Senator Clayton reported out the bill as introduced.

The amendatory language of that bill reads as follows:

> "To the main ship channel of Green Bay which passes on the western side of the islands situate therein; thence along said main ship channel of Green Bay to the middle of Lake Michigan as further described in said act."[65]

The report upon this bill, written by Senator Clayton, quotes from the report of Captain Cram.

It would seem, under these circumstances, that there can be no question but that the intention of Congress, in framing the Michigan Enabling Act, was that the boundary was to follow the center of the lane of travel of ships through Green Bay, and upon being advised there was a question as to which side of Chamber's Island was the most used lane of shipping, they attempted to settle this question by further enactment.

This clarifying legislation never became law, but it certainly is conclusive of the fact that Congress had knowledge of the situation that there were lanes of vessel travel in Green Bay, and that to such lanes of vessel travel reference was made in defining the boundary, and that these lanes of vessel travel were in the body of Green Bay.

It further appears in the record in the old case, that following the report of Captain Cram, Congress appropriated the sum of $10,000.00 for the purpose of surveying and determining the boundary defined in the Michigan Enabling Act, the expenditure of which money was

[65]Record page 119.

entrusted to the U. S. Lake Survey Office. The money was expended in surveying the eastern portion of Green Bay.

The original data on which our present government charts are based, was obtained through this survey.

It is perfectly true that at the time the Act of Congress defining the Michigan boundary was passed, there were no such maps extant involving this particular area. It is likewise true that Congress knew there would be such maps in the course of time.

It is not a violent assumption to say that these sailing courses are a determination of the line referred to in the Act of Congress.

This assumption was first advanced by the State of Wisconsin in the former case,[66] and there is not one word of evidence in this case to indicate that it is improper.

It appears in evidence in this case that all power driven vessels follow these lines exactly in negotiating the channels that they are traversing and that sailing vessels with a favorable wind do likewise.[67]

It further appears that sailing vessels faced with an unfavorable wind lay their course on and off this center line passing further to one side or the other of such sailing course, depending on the wind, but that nevertheless the sailing course given on the chart may be said to be the center of the sailing course used by sailing vessels in working to windward.[68]

It appears from the record in the old case that approximately one-half of the tonnage of the period moved in steamers.[69]

It further appears that there was a regularly established steamboat line between the Village of Green Bay

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[66] Wisconsin Brief, old case, page 253.
[67] Record page 26.
[68] Record page 27.
[69] Wisconsin Brief, old case, page 241.

and Buffalo, New York. Likewise, that there were local pilots familiar with the water of Green Bay who aided navigation.[70] All through the Wisconsin brief in the old case, traffic to Green Bay was emphasized.[71]

We think it only a natural assumption that the greater proportion of the vessel travel in 1836 followed the same line that would be followed today by a vessel passing between the same terminii. That course of travel has been depicted upon the charts in evidence in the case and forms a desirable boundary because it is a readily ascertainable line.

Wisconsin claims that there is no necessary track of navigation in Green Bay. We take issue with this statement and urge that while it is possible for vessels to navigate the greater part of Green Bay, still, because of shoals, islands, and reefs, it is expedient that vessel travel be confined to accepted and adopted routes through the various passages.

Navigation must go on, in daylight and dark, fair weather and foul, and to a navigator out of sight of landmarks, course and distance are the sole reliance. Aids to navigation are erected and maintained with a view to promoting travel along these usual and accepted lanes and the allowance for practical error in following such lanes of travel is not determined by the breadth of navigable waters at the widest point, but rather at the narrowest. Lack of visibility, through fog, snow, rain, or darkness, may prevent a landfall, which would provide correction at the narrow straits, and the navigator must always contemplate the possibility of passing this narrow strait at a distance from his last known bearing point without other source of determining his position than his dead reckoning from the course and distance traveled.

[70] See Wisconsin Brief, former case, pages 230 and 231.
[71] See Wisconsin Brief, former case, particularly page 164.

It would seem that there is every argument in favor of adopting the sailing course as the center of the ship channel and that there is no logical argument for any other location of this line in view of the language of the Act.

MICHIGAN'S POSSESSION AND THE LAW OF THE CASE

It appears that at the time of the settlement of the decree in the former suit, the parties were in accord as to the true location of the boundary with two exceptions. The opinion of the court had been sufficient to settle all questions in the mind of counsel for the respective parties, except as to the right of jurisdiction over Sugar Island and the triangular area in the waters of Green Bay.

There is in the record the expressions of both counsel as to their understanding of the determination of these questions.

For the sake of argument, we accept the explanation given by Wisconsin counsel, Mr. Reiser. He states that he had never thought of making any claim to this territory until after the opinion was filed and he was about to propose a decree. He admits specifically that his claim to Sugar Island was in the nature of a claim for affirmative relief, and from the bill of complaint in this case it fairly appears that he understood that the claim to the triangular area was also a claim in the nature of affirmative relief.

Mr. Reiser says:

> "We had taken the position in the trial that the rights of the parties were determined on the basis of the jurisdiction they had exercised over the par-

> ticular area involved and we had not by way of formal claim or counterclaim made any claim to Sugar Island, but when the decision came out we felt that that being the wording of it, that that island belonged to Wisconsin, and when that claim was made and discussed it was not discussed very long."

The answer to that claim is given in the testimony of Mr. Reiser, quoting in substance the language of Mr. Justice Sutherland:

> "That if Wisconsin was making claim to something they had not had prior to that time and it could not be adjusted, that the court would have to reopen the case because it was the understanding of the court when it rendered its opinion that it was not intended to disturb any existing status so far as sovereignty was concerned in any part of that boundary; in other words, it was going to leave the states where it found them and where they had recognized their sovereignty extended."

The only evidence in this case which we can find which supports the theory that this triangular water area may have belonged to Wisconsin and not to Michigan at the time of the entry of the former decree, is a copy of a newspaper article published in Menominee, Michigan, on approximately the date of the announcement of the decree. The headline and the greater proportion of the article referred to the fact that this Court had decreed that Sugar Island belonged to Michigan.

In view of the undisputed evidence in this case that Michigan Conservation officials had been patrolling the area described in the newspaper article for twelve or fifteen years prior thereto, the statement in this news article seems to be unfounded to the extent that it indicates, if at all, that title over the area had been transferred from Wisconsin to Michigan.

If the facts were as claimed by Wisconsin to be indicated by this news article, that Wisconsin had actually possessed this area and Michigan obtained it through the decree, then the allegation in that respect in the bill of complaint should have been sustained by some better evidence than the inference from a newspaper article manifestly not in any way official.

At the time the article appeared, the attorneys for Michigan, interested, were present before the court at Washington. The source of information upon which the article is based is not shown in the record.

In this case we have the specific finding of the Master that the State of Wisconsin had not acquired title to this water area by prescription.

We further have the uncontroverted fact that the State of Michigan was exercising jurisdiction in the area and it is apparent that to oust that jurisdiction would constitute affirmative relief in favor of Wisconsin. This is exactly what Mr. Justice Sutherland said might not be done under the doctrine of the opinion in the former case. That doctrine is the *law of the case* and must control in the instant circumstances.

This court has said that the phrase *"law of the case"* expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.

Messinger vs. *Anderson*, 225 U. S., 436; 56 L. ed., 1156.

Northern Pacific Railroad Co. vs. *Ellis*, 143 U. S., 458; 36 L. ed., 504.

King vs. *West Virginia*, 216 U. S., 100; 54 L. ed., 401.

THE BEDELL CASES

We have said that there is not one word of evidence in the present record indicating the exercise of jurisdiction by the State of Wisconsin in the water area involved in this case.

The only effort to make any showing in that regard is the testimony and record in regard to the actions brought by three Wisconsin fishermen against the Michigan Conservation officer, A. B. Bedell, in the year 1910. The Exhibit E attached to the record shows the location of the nets involved in those actions, the blue ink lines extending from the location marked "WP" and points southerly thereof to and across the sailing courses just northwest of Chamber's Island.

According to the testimony of the witnesses produced in this case, the actual location of the nets would be between the stars on the easterly ends of these lines and the nets actually extended across the line which was decreed by this court to be the boundary. That is to say, under the record in this case the nets would have been partly in Michigan and partly in Wisconsin.

It fairly appears from the record that the Michigan warden seized these nets which were being operated under the ice, but that he did not personally serve process upon the owners of the nets in Michigan.[72]

Thereafter the Michigan Conservation warden, being present in Wisconsin, was served with process in three actions of replevin brought against him by the fishermen to recover their nets.[73] The case was brought on for trial in the Circuit Court for the County of Marinette, Wisconsin. The evidence adduced in that case has not been produced, but we have the testimony of Mr. Tracy

[72]Record page 49.
[73]Record page 122.

as to what the issues were and the substance of the evidence.[74]

The record shows that the conclusion of the jury was that the easterly end of the nets were located[75] as shown by the stars on the chart,[76] and it thus appears that the only conclusion of the court was that the east end of the nets was in water which would be Wisconsin under the decree of this court.

There is no showing that there was any evidence in the former case which indicated where the westerly end of these nets was located or in what direction they ran or what their length was.

We have Mr. Tracy's explanation of the issues to the effect that the question of the location of the boundary was not involved. That it was fairly and squarely an issue of fact as to whether the nets were very close to the Michigan mainland or were in the position where the jury determined they were. He points out that the warden was defending on the theory that the nets were very close to the Michigan bank and expected to support this claim by the testimony of a surveyor.

The fishermen's witnesses were making the claim that the nets were as determined in the verdict of the jury and the case was submitted upon the question of *where were the nets*, not *where was the boundary.*

It was, of course, not a sufficient defense that a part of the nets may have been in Michigan, but essential that the warden should show that all the nets he had seized were in Michigan water. He did not avail himself of the defense that part of the nets were in Michigan. Mr. Tracy said they based their defense solely on the

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[74]Testimony of John E. Tracy, Record page 53-57.
[75]Testimony of John E. Tracy, Record page 57.
[76]Testimony of Capt. Angwall, Record page 52.

claim that all of the nets were well within Michigan water.

We do not believe these proceedings can be construed to be the exercise of sovereignty by the State of Wisconsin in that area. The State of Wisconsin participated merely in providing the forum for a transitory action. The question of the location of the boundary was not in issue and the official action of the State of Wisconsin went only to the extent of granting relief of the courts to its own citizens. No officer served any process or took any action by virtue of his capacity in the disputed area, except the Michigan officials, and it is our belief that this evidence is more potent to show the exercise of sovereignty and jurisdiction over this area by the Michigan officials than by the State of Wisconsin.

CONCLUSION

The pleadings in this case raise only one issue and that is eliminated by the findings of Special Master to which plaintiff has not excepted.

The issue raised by plaintiff's exceptions to the Special Master's report is not directly based on the pleadings in this case, but is in the nature of a rehearing of the issues in the former suit.

The Master reports:

> "The action is one praying for the true location of a boundary line. In an action of this character it is the duty of the court to establish the *true* boundary line, if possible, irrespective of the assumptions or claims that may be made by the parties."[11]

The Master, we believe, has carried this principle further. He has disregarded the findings of this court and their necessary inferences. He has gone beyond the

[11] Master's report, page 39.

pleadings and made findings of fact on matters not litigated before him.

The opinion of this court is to the effect that the language of the Michigan Enabling Act refers to the center of a ship channel in the body of Green Bay.

The decree specifically defines this center line.

The pleadings do not attack the existence or location of this line.

The defendant offered no proofs in this case upon that issue, except incidentally.

It was not referred to in the briefs or arguments of counsel before the Master.

After the exhaustive hearing on this subject in the former suit, the findings in that case should not be reversed without opportunity to defendant to support them, if they are subject to review at all.

Neither party to this suit has attempted to prove the existence of a *most usual ship channel* in the body of Green Bay because both parties assumed its existence and location was finally determined by the opinion of this court.

All of the findings and recommendations of the Master, except as to transcriptional errors resulting from mutual mistake, are based on the finding of non-existence of this ship channel.

It is this finding of error on which the Master bases the plaintiff's right to maintain its suit.

It is on this finding that both the alternative recommendations are based directly or indirectly.

The boundary under the first recommendation would substantially follow the sailing courses defined in the decree, except for the triangle opposite Menominee, which would pass to the jurisdiction of Wisconsin.

The language of this recommendation and the Wisconsin proposed decree are almost identical—the de-

scription is in reverse order from the Act of Congress—the result is the same which Wisconsin sought on settlement of decree in the former case.

A result which plaintiff attempted to reach in this suit by allegations of possession and the exercise of sovereignty.

This allegation has failed of proof and the boundary in this area is not established by user but depends on the grant.

This court, in its opinion and decree, construed that grant.

Plaintiff now asks the court to again construe the same language, not as the Master construed it nor as the same party construed it in the former action.

This upon the doctrine that it is the court's duty to find the correct boundary in spite of the acts of the parties.

This is not the doctrine applied by this court in the former case.

This court determined issues of much greater import between these parties upon the principle that the acts of the parties had precluded any affirmative relief.

Wisconsin sought no affirmative relief in its pleadings in the former suit. The entire defense negatived the possibility of affirmative relief to either party. The court adopted the defendant's theory of a boundary by the exercise of dominion and acquiescence therein.

Upon settlement of decree Wisconsin attempted to define the boundary in such manner that territory then under the jurisdiction of Michigan would be included within the boundaries of Wisconsin.

To this effort Michigan objected upon the record in that case.

The territory involved was the "triangular water area" and "Sugar Island."

The court, acting through Justice Sutherland, disposed of this effort by Wisconsin by applying the doctrine of the opinion. "It was the intent of the court to leave the parties where it found them." There was to be no affirmative relief to either party.

This doctrine was recognized by Wisconsin counsel in drafting the bill of complaint in this case.

Relief is sought on the theory that the decree was a mistake and actually resulted in transferring to Michigan an area over which Wisconsin was actually exercising sovereign jurisdiction.

The issue has been met and refuted.

There is no question but that Michigan officials were patrolling this water area for a considerable period prior to the entry of decree. The attempt to enforce Michigan law in the area was at least partially successful and was never challenged by the State of Wisconsin, although perhaps frequently evaded by its citizens.

To give jurisdiction over this area to Wisconsin *then or now* would oust the jurisdiction of the Michigan officials and constitute affirmative relief.

This court has established and no doubt will maintain a policy of non-aggression.

As to the transcriptional errors resulting from mutual mistake the decree of the court should be clarified.

As to the territory of the respective sovereigns—requiescat in pace.

Respectfully submitted,

HARRY S. TOY,
Attorney General of Michigan.

EDWARD A. BILITZKE,
Assistant Attorney General of Michigan.

MEREDITH P. SAWYER,
Special Counsel.

DIAGRAM NO. 1

Wisconsin Fishermen Produced by Plaintiff Who Admitted Operating Under Michigan Non-Resident Licenses During Part or All of the Period Covered by Their Testimony.

NAME OF WITNESS	Page of Record on Which Testimony Regarding License Appears	Page of Record on Which Witness Explained Holding of Michigan License, If At All.
John Cornell	24	Always held Michigan license.
Andrew Cornell	32	Fished with one of the Cornell outfits, both of which were licensed in Michigan at all times. R 32.
William Cornell	33	
Lawrence Voight	34	This witness testified that the letters WIS had at one time been painted on the buoy on the east end of Whaleback Shoal, nevertheless he purchased a license during the period of the patrol.
Albert Goodmander	27	Bought license after encounter with wardens. (See testimony of Capt. Ellsworth R 19. Also testimony of Albert Goodmander R 27-28.)
Ernest Ellefson	37	That said line was always in dispute was his reason for buying license. R 36-37.
Emil Nelson	29-30	Bought license after being arrested twenty-four years ago. Said sailors never had any boundary in Green Bay. R 29-31.
Stanley Voight	28	Was boarded by Michigan Patrol northeast of Whaleback. R 29.
Frank F. Seidl	43-44	This man resides in Menominee but conducts his business from Marinette, Wisconsin, and is licensed in both states.

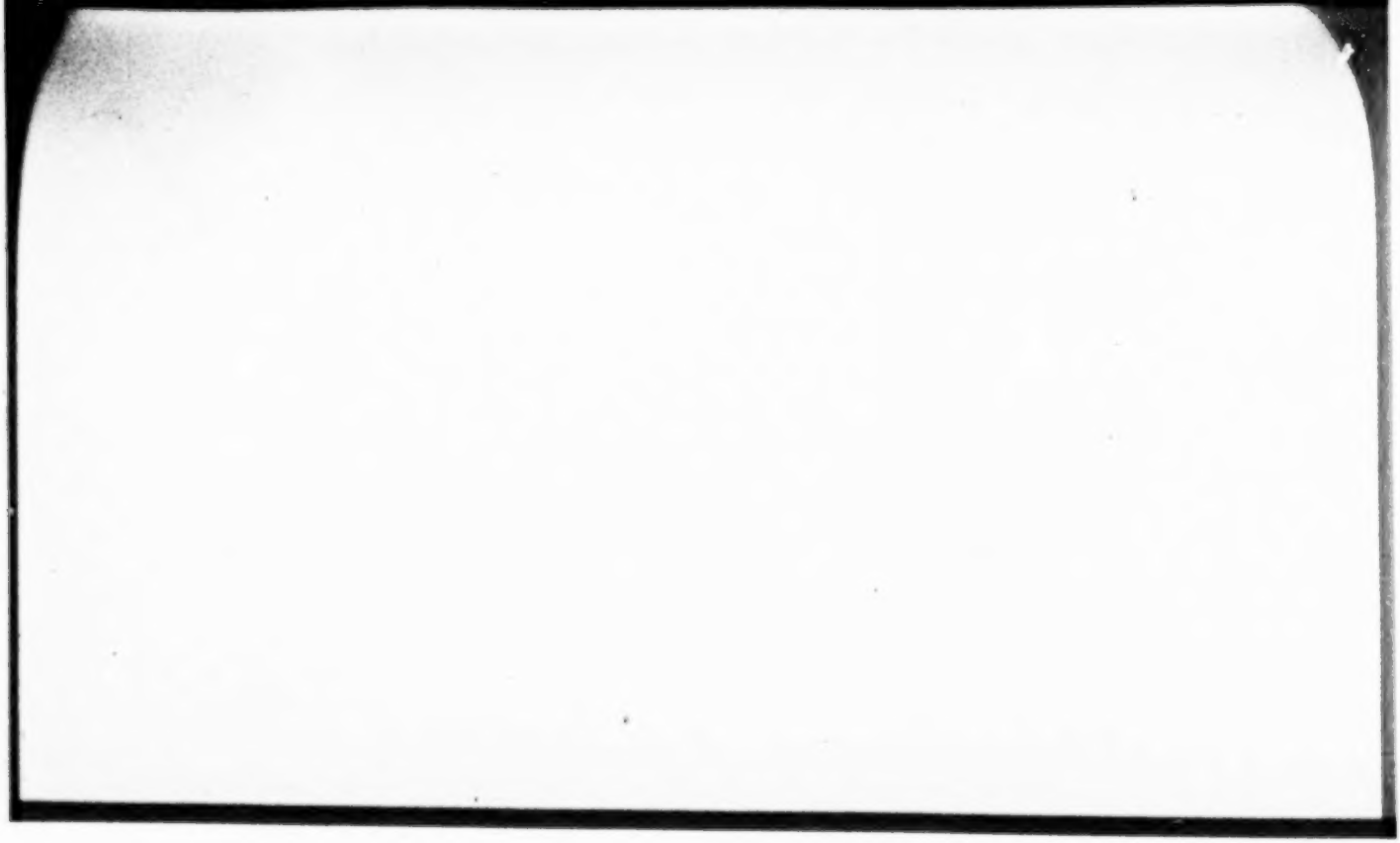
The Following Witnesses, Whose Testimony Has Not Been Incorporated in the Printed Record, Admitted Having Michigan Licenses. Reference is Given to Transcript Pages of Such Testimony.

NAME OF WITNESS	Page of Record on Which Testimony Regarding License Appears	Page of Record on Which Witness Explained Holding of Michigan License, If At All.
Claude Cornell	27	
George Cornell	34	
Aleck Johnson	50	This witness testified that the letters WIS had at one time been painted on the buoy on the east end of Whaleback Shoal, nevertheless he purchased a license during the period of the patrol.
Mathew Foss	74	
Swara Hagan	82	
Maurice Bilton	87	Said steamer course or red line north of Chamber's Island objective was always recognized as the boundary.
Maurice Martin	91	
Fred M. Hanson	96	
Lloyd Young	97	
Arthur Hanson	104	
William Johnson	140	
Oscar E. Olson	147	
Richard Kleinke	198	This man formerly resided in Michigan but now works and lives in Menekaune, Wisconsin, and is licensed in both states.
Isaac Bergren	243	Testified that the Peterson referred to in testimony of Louis Gamlin as a Michigan resident, was a Wisconsin resident fishing without a Wisconsin license.
Aleck Niglon	333	Fished on employer's Michigan license at other times. R 336.
Arthur Olson	337	

DIAGRAM NO. 2

Names of Witnesses and Record Page on Which Witness Admitted or Asserted Knowledge of Michigan Patrol Along the Red Line.

Plaintiff's Witnesses	Record Page	Defendant's Witnesses	Record Page
John Cornell	24-25	Mike Zettel	37
Andrew Cornell	32-33	Nat Bailey	39
Claude Cornell	33	Ed Person	39-40
William Cornell	33-34	Charles Bailey	40-41
Lawrence Voight	34-35	John Barstow	41-42
Carl Richter	36	Robert Ellsworth	17-18
Albert Goodmander	27		
Ernest Ellefson	36-37		



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CLERK

IN THE SUPREME COURT of the UNITED STATES

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No. ~~15~~ Original—In Equity

STATE OF WISCONSIN,
Plaintiff,

vs.

STATE OF MICHIGAN,
Defendant.

BRIEF FOR THE DEFENDANT

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STATEMENT OF FACTS

On January 13, 1936, this court ordered that the record in the present proceeding be settled by January 27th, and that briefs of the parties be filed on or before February 17th.

At this writing we have not received Wisconsin's brief. Our "Statement of Facts" will therefore cover in full the present issues before this court.

PRESENT ISSUES

The issues now before this court involving a portion of the boundary between Wisconsin and Michigan, is

the result of a bill of complaint filed by the State of Wisconsin on October 24, 1932 (77 Law. Ed. 502) alleging that the decree entered by this court on November 22, 1926 (71 Law. Ed. 315) did not carry into effect the decision of this court rendered on March 1, 1926 (70 Law. Ed. 595) in that a portion of the boundary described in the decree was erroneous.

The opinion of this court following the report of Frederick F. Faville, Special Master, dated May 20, 1935, (79 Law. Ed. 1545) aptly describes the present issue:

> "No right of either party to use the waters of the bay for navigation is here involved. Questions of territorial jurisdiction in respect of fishing constitute the occasion of the present controversy."
>
> "On the facts found, equality of right can best be attained by a division of the area as nearly equal as conveniently may be made, having regard to the matters heretofore litigated and finally adjudged between these states."

This court found that the boundary line should be established as follows:

> "The decree to be entered in this case will establish the boundary through and along, or near, the middle of the waters of Green Bay that are here involved. That line commences at a point midway between the piers at the harbor entrance of the Menominee River; thence east by south seven and one-eighth miles; thence approximately north by east one-eighth east, about eight and seven-eighths miles; thence to and along a line in or near the middle of the bay to a point west of the Rock Island passage; thence easterly by courses and distances to be designated through that passage to the boundary in the middle of Lake Michigan. The decree will appropriately define the tracts called 'Grassy Island' and

'Sugar Island' and declare them to belong to Michigan."

The cause was again referred to the Special Master, directing him to:

"• • • prepare and submit to the court a form of decree which will give effect to this decision. Inasmuch as the preparation of the decree may involve the ascertainment of physical facts and the formulation of technical descriptions, the master is authorized to hear counsel, take evidence and procure such assistance, if any, as may be necessary to enable him conveniently and promptly to discharge the duties here imposed upon him. He may call upon counsel to propose forms of decree. He is directed to give them opportunity to submit objections to the form prepared by him and to include the objections, if any, in his report."

The "SUPPLEMENTAL REPORT OF SPECIAL MASTER AND PROPOSED DECREE" has been filed together with objections by the State of Wisconsin to the Master's report and proposed decree. Michigan does not except to the Master's findings or his proposed decree.

The proofs submitted to the Master pertaining to the settlement of a decree is before this court as "ABSTRACT OF TESTIMONY AND RECORD MADE BEFORE THE SPECIAL MASTER PERTINENT TO THE SETTLEMENT OF DECREE."

THE MENOMINEE RIVER SECTION

The present dispute in the boundary line in a portion of the Menominee River involves "Grassy Island" and "Sugar Island" which islands border on the north bank

of the Menominee River and are a short distance from the mouth of the river. Wisconsin abandoned all claim to these islands by failing to except to the original findings of the Special Master herein. This court found that the decree herein should establish the boundary line in that portion of the Menominee River Section as follows:

> "The decree will appropriately define the tracts called 'Grassy Island' and 'Sugar Island' and declare them to belong to Michigan."

By consent of counsel an accurate survey was made of that portion of the Menominee River in dispute, by the City Engineer of Menominee, Michigan, and the City Engineer of Marinette, Wisconsin, and the technical description proposed by the Master is in accordance with that survey. The proposed boundary line from the interstate bridge between Marinette, Wisconsin, and Menominee, Michigan, to the end of the Menominee River piers as thus surveyed is shown on Exhibit A attached to the Master's report.

Wisconsin's Proposed Decree (Report p. 19) and Wisconsin's Alternative Proposed Decree (Report p. 22) approve the proposed boundary line in the Menominee River Section by providing that such survey report should be included therein.

Wisconsin does not object to the proposed boundary line in the Menominee River Section in accordance with the foregoing survey.

THE GREEN BAY SECTION

PROPOSED BOUNDARY LINES—GREEN BAY

Master's Proposed Line: A, B, C, K. L, R, H & S

Wisconsin's Presently Proposed Line: A, B, C, D, a' & S. (Report p. 31)

We do not treat Wisconsin's present effort to locate the line from point A to C as a *proposed* line for the reason that it was not proposed to the Master and its present position is that the line should run from A to C only in the event this court determines that the line R H is justified. (Report p. 32). We treat the issue respecting the location of the boundary at points A, B & C as definitely fixed and determined by the present opinion of this court and no longer an issue.

• • • • •

The Master's Supplemental Report covering the proposed boundary line commencing at the outer piers of the Menominee River, passing through Green Bay and terminating at the center of Lake Michigan, discusses the same under six natural divisions numbered I to VI inclusive. We follow the same order. All portions of the proposed boundary in the Green Bay area are shown on the map or chart attached to the Master's Report as Exhibit "B".

I

POINT A (HARBOR ENTRANCE) TO B

Under subdivision "I" the Master recommends (Report pp. 8 and 17) that from a point midway between the outer ends of the Menominee Harbor piers (Point A) the boundary run:

> "a true course of which the azimuth is one hundred one degrees and fifteen minutes (101° 15′) for eleven thousand four hundred seventy (11,470) meters, the same being approximately east by south for seven and one-eighth (7⅛) miles."

This conforms to the present opinion of this court which determined that the boundary line:

> "commences at a point midway between the piers at the harbor entrance of the Menominee River; thence east by south seven and one-eighth (7⅛) miles." (79 Law. Ed. 1545).

The same line A B is adopted by Wisconsin in "Wisconsin's Proposed Decree" (Report p. 20), and in "Wisconsin's Alternative Proposed Decree" (Report p. 23). The said "Wisconsin's Proposed Decree" and "Wisconsin's Alternative Proposed Decree" recommending the said line A B were filed with the Master before he made his findings and proposed decree. (Report p. 4). Later when Wisconsin filed its written objections to the said findings and proposed decree, it did not specifically object to the line A B. (Report p. 25). Without specifically objecting to the line A B Wisconsin now proposes that the line should run from A to C in the event the line on the northerly end "R to H", which it objects to, "is justified because of convenience," (Report p. 4) "or justified as 'cutting corners' because of convenience." (Report p. 32).

The plaintiff, having proposed the line A B as adopted by the Master, is in no position at this time to propose the line from A to C because of the location of the northerly line as proposed by the Master.

This court will recall that this present action is the result of Wisconsin's efforts to obtain jurisdiction of water area of about 35 square miles lying opposite the city of Menominee which it would now obtain by now locating the boundary from point A to C. (See Paragraph 10, Page 31 of Petition for Leave To File Bill of Complaint, Bill of Complaint, and Memorandum Brief

filed by Wisconsin in 1932.) Although the Master in his first report (Report of Special Master, p. 44) recommended that a portion of that water area be given Wisconsin, this court disapproved of that finding and specifically fixed this portion of the boundary as running from point A to B. (79 Law. Ed. 1545).

The Master found that line A B extended "exactly one-half the distance from the pierheads at the harbor entrance to the opposite Wisconsin shore." (Report p. 8).

II

B TO C

From said point B the Master recommends the line B C, namely:

> "5. Thence upon a true course of which the azimuth is eleven degrees and forty-five minutes (11° 45′) for fourteen thousand two hundred fifty (14,250) meters, the same being approximately north by east for eight and seven-eighths (8⅞) miles." (Report pp. 8, 17).

The line B C was determined by the opinion of this court, which found that the decree herein should establish the boundary from point B to:

> "thence approximately north by east one-eighth (⅛) east, about eight and seven-eighths (8⅞) miles." (79 Law. Ed. 1545).

As noted by the Master point C is two (2) miles west of the Chambers Island light; that the line B X on Exhibit "B":

"indicates the exact geographical center of the bay, but it (B X) cannot be adopted because it traverses Chambers Island, which belongs wholly to Wisconsin * * *." (Report p. 8).

The same line B C is recommended by Wisconsin in "Wisconsin's Proposed Decree" (Report p. 20), and in "Wisconsin's Alternative Proposed Decree" (Report p. 23).

As heretofore observed in subdivision "I", the said decrees proposed by Wisconsin recommending the line B C were filed with the Master before he made his findings and proposed decree (Report p. 4). Wisconsin does not specifically object to the line B C but would have the line run from A to C in the event the line on the northerly end "R to H", which it does object to, "is justified because of convenience," (Report p. 4) "or justified as 'cutting corners' because of convenience," (Report p. 32).

Wisconsin having proposed line B C as adopted by the Master is in no position to object to the determination of the Master that the line should run from A to B to C.

III

C TO K

From said point C the Master recommends the line C K, namely:

"6. Thence upon a true course of which the azimuth is fifty-eight degrees and fifty minutes (58° 50′) for eight thousand two hundred ninety (8,290) meters, the same being approximately northeast by east one-fourth east for five and one-eighth (5⅛) miles." (Report pp. 9, 17).

The opinion of this court provides that from point C the boundary line should run:

> "thence to and along a line in or near the middle of the bay to a point west of the Rock Island passage;" (79 Law. Ed. 1545).

The Master found that from point C it was necessary to run "to a point practically in the center of the bay." He said:

> "It (line C K) carries the line approximately 'to' the middle of the bay, and it practically compensates Michigan for the loss of area by the division from the center of the bay caused by carrying the line to the west of Chambers Island." (Report p. 9).

Wisconsin's Proposed Decree would run the line from point C to Y. (Report p. 20).

Wisconsin's Alternative Proposed Decree would run the line from point C to D. (Report p. 23).

Wisconsin excepts to this finding of the Master and contends for the line C D. (Report p. 25, Paragraph 1) (Report p. 31, Paragraph 6).

IV

K TO L

From said point K the Master recommends the line K L, namely:

> "7. Thence upon a true course of which the azimuth is forty-two degrees and eighteen minutes (42° 18′) for sixteen thousand seven hundred eighty (16,780) meters, the same being approximately

northeast one-fourth north for ten and one-half (10½) miles." (Report pp. 9, 17).

The opinion of this court directs the location of the boundary line:

> "along a line in or near the middle of the bay to a point west of the Rock Island passage." (79 Law. Ed. 1545).

The Master found that the line K L:

> "is almost exactly in the geographical center of the bay, and it also is directly in line with the Chambers Island light (X) to the south and the Whaleback shoal gas buoy (L) to the north. The Chambers Island light is a permanent and well-known guide-post. At point L is located a gas buoy marking the eastern end of the Whaleback shoal. This buoy is maintained by the United States. It is removed during the winter months and replaced after the ice has gone out in the spring. Its location is, however, determined by accurate measurements and is the same each year. The record shows that this gas buoy will, in all probability, be replaced by a permanent lighthouse in the near future." (Report p. 9).

Wisconsin's Proposed Decree would run the corresponding line from point Y to D. (Report p. 20).

Wisconsin's Alternative Proposed Decree would run the corresponding line from point C to D. (Report p. 23).

Wisconsin excepts to the Master's recommendation of line K L and contends for line C D. (Report p. 26, Paragraph 2, and p. 31, Paragraph 6).

V

L TO R

From point L the Master recommends the line L R, namely:

> "8. Thence upon a true course of which the azimuth is twenty-eight degrees and ten minutes (28° 10′) for eleven thousand five hundred eighty (11,580) meters, the same being approximately north northeast one-half east for seven and one-fourth (7¼) miles." (Report pp. 10, 17).

The opinion of this court directs the location of this portion of the boundary line:

> "along a line in or near the middle of the bay to a point west of the Rock Island passage;" (79 Law. Ed. 1545).

The Master found that the line L R:

> "is just such a line. This is 'in and along the middle of the bay' and the point R is directly west of the Rock Island passage." (Report p. 11).
>
> • • •
>
> "I am not directed to divide all the waters of Green Bay lying north of the base line A B. I am ordered to draw a line 'in or near the middle of the bay to a point west of the Rock Island passage.' When I have reached that point I am to turn the line 'easterly.' That point I find to be R on the chart, • • •
>
> "I call the court's attention to the fact that the point R is not only approximately in the middle of the bay east and west, but is in the direct line between the Whaleback shoal buoy and the Minneapo-

the line R H, (Report p. 29, Paragraph 9) and contends for line a' H. (Report p. 31, Paragraph 8).

VII

H TO S

From said point H the Master recommends the line H S, namely:

> "10. Thence upon a true course of which the azimuth is one hundred twenty degrees (120°) for forty-five thousand six hundred (45,600) meters, the same being approximately southeast by east three-eighths east for twenty-eight and three-eighths (28⅜) miles, to the center of Lake Michigan." (Report pp. 12, 18).

The opinion of this court directs the location of the boundary line from the Rock Island passage:

> "to the boundary in the middle of Lake Michigan." (79 Law. Ed. 1545)

The Master found that the line H S:

> "is drawn scientifically along a perpendicular to the axis of Lake Michigan in that locality and passes to the middle of the lake. I think the Wisconsin Territorial Act calls for a right angle turn in the center of Lake Michigan. The line described therein passes northerly along the center of Lake Michigan to a point opposite the Rock Island passage, and thence through said passage. I think this description contemplated a right angle turn in the center of Lake Michigan opposite the Rock Island passage. Such is the line I have proposed in the decree." (Report p. 12)

Wisconsin's Proposed Decree would run the corresponding line from point H to S, being the same line adopted by the Master. (Report p. 20)

Wisconsin's Alternative Proposed Decree would run the corresponding line from point H to J. (Report p. 24)

Wisconsin excepts to the Master's recommendation of line H S (Report p. 29, Paragraph 10). However, it recommends the same line H S but urges that it should be extended from point H to point a' in Green Bay. (Report p. 31, Paragraph 8)

ARGUMENT

MENOMINEE RIVER SECTION

There being no present dispute regarding the location of the boundary running from the interstate bridge between Marinette, Wisconsin, and Menominee, Michigan, and the same having been determined by an accurate survey, made jointly by the city engineer of Menominee, Michigan, and the city engineer of Marinette, Wisconsin, we urge the adoption of the Master's proposed line without argument.

THE GREEN BAY SECTION

MASTER'S PROPOSED BOUNDARY LINE RESULTS IN AN EQUAL DIVISION OF THE WATER AREA IN THAT PORTION OF GREEN BAY NOW IN DISPUTE AND IS A PRACTICAL LINE.

Pursuant to the order of this court, the Master has prepared and submitted a form of decree which he found

would "give effect" to the decision of this court. He aimed to fix a boundary line that would "as nearly as possible, * secure equality in the water area; *** and draw a practical line." Having in mind that this line will establish jurisdiction with reference to fishing rights, the line should be one that may be reasonably located by commercial fishermen. The Master so indicated during the course of the hearing on the settlement of the decree by stating:

> "I think a sacrifice of a small area of water would be obviously quite proper if we could tie it so that it would be inexpensive and certain as to where the line was." (Report p. 15)

The line, as fixed by the Master, is projected between fixed monuments and points that may easily be recognized and followed by fishermen and others. Mr. Charles H. Hubbard, Superintendent of Lighthouses for the 12th District, which includes Green Bay, is very familiar with the entire water area here involved, having been in command of a lighthouse steamer navigating those waters as far back as 1892. He explained that the "location of lighthouses are the predominant characteristics in locating yourself on the water ***." (Report p. 26)

After leaving the harbor entrance in the Menominee River, the Master's proposed boundary may be easily determined by the following fixed monuments:

> Point B, by its relation to Green Island Light, which is south and west of Point B, and its relation to the lighthouse at point X. The Green Island Light and the light on Chambers Island are maintained through the winter because of the all winter car ferry service into Menominee. (Abstract of Testimony p. 37)

Point C, is two miles due west of the Chambers Island lighthouse at point X.

Point K, is determined by its reference to a spar buoy north of the Chambers Island shoal, as that line intersects a line from point X to point L (Abstract of Testimony p. 19).

Point L, the present gas buoy on the eastern end of the whaleback shoal will be replaced by a permanent lighthouse and fog signal. It has been recommended by Captain Hubbard, Superintendent of Lighthouses, to the Lighthouse Bureau (Abstract of Testimony p. 31).

Point R, determined by its relation to point L and the Minneapolis Shoal Light, a lighthouse and fog signal (Abstract of Testimony p. 31).

Point H, a gas buoy light, accepted by both parties as a common point.

CENTER OF BAY

The testimony shows that the Master's proposed boundary line will divide the water area of Green Bay "here involved" almost exactly equally between Wisconsin and Michigan, with a slight advantage in water area to the State of Wisconsin. While this fact is self-evident from the map, we call attention to the testimony pertaining to the center or middle of the water area have involved. Point B is exactly half-way across Green Bay. (Abstract of Testimony, p. 12) The center line then passes over Chambers Island and is at point X. (Report p. 81 and Abstract of Testimony p. 2) Point L is approximately one-half mile east of the geographic center of the bay at that point. (Abstract of Testimony p. 5) Point R is approximately in the middle of the bay east and west. (Report p.12) Point H is three-eighths of a mile north

of the center of Rock Island Passage. (Report p. 19)

This court having definitely determined that the boundary line should run to the west of Chambers Island at point C, which is approximately two miles west of the island, it was apparent that Michigan should be compensated for the loss of water area occasioned by the line running west of Chambers Island. The line proposed by Wisconsin does not do so. Mr. Nisen, testifying in behalf of Wisconsin, had proposed that the line run from point C to Y D a' H (Abstract of Testimony, p. 17). He admitted that this line would not compensate Michigan for the loss in water area south and west of Chambers Island. (Abstract of Testimony, pp. 14, 15) He was asked whether Michigan would be compensated for the lost area by running the line from Chambers Island to the light on the east end of Whaleback Shoal. He stated:

> "A. I didn't think that that was equal to the loss west and south of the island; No.
> Q. In other words, Michigan wouldn't be getting back quite as much as they lost?
> A. No, not if that is to be considered to the south." (Abstract of Testimony p. 16)

Dr. R. A. Smith, State Geologist for the State of Michigan, had proposed the line from C K L M H as passing approximately through the geographical center line of that portion of the bay. (Abstract of Testimony p. 21) The line M H was drawn parallel to line A B. The line R H, proposed by the Master, runs due west from point H. Dr. Smith computed the water surface lying to the east of line A B C K L M H and the water area lying to the west of that line, with the base line and top line projected across the bay, in units of area. These measure-

ments were made with a planimeter, an instrument used for measuring areas. The instrument was run around the area by following the shore line, except for Washington Island, which was crossed directly from point to point because the bay is longer than it is narrow. Such measurement showed that the Michigan area would be 126.3 units, and the Wisconsin area 130.35 units, or 3%, in favor of Wisconsin; that is, Wisconsin would have the larger water area.

He made the some calculation with reference to the water area by Wisconsin's alternative proposed boundary line A B C D E F G. With that line Wisconsin's area would be 167.3 units, and the Michigan area 129.7 units. Wisconsin would have 37.5 units more. (Abstract of Testimony p. 20)

The line L M suggested by Michigan was not adopted by the Master. He would extend the line more westerly from L to R and thereby enlarge the water area which would fall to Wisconsin as calculated by Dr. Smith. However, point R is southerly of point M. North of point R Wisconsin would lose some water area as calculated by Dr. Smith. A glance at the map indicates that the area is practically counterbalanced by reason of the original loss to Michigan south and west of Chambers Island, the slight gain to Michigan by running the line to point L; the gain to Wisconsin by running the line to point R, the gain to Michigan by adopting the line R H instead of the line M H, and the gain to Wisconsin by using the common point H which is three-eighths of a mile north of the geographical center line of Rock Island passage (Abstract of Testimony p. 19).

The line now proposed by Wisconsin, A B C D a' S, would throw to Wisconsin water area north and west of the Rock Island passage. The Master found that "the

portion of Green Bay lying to the north of a point west of the Rock Island passage" was not involved and not to be divided. (Report p. 10, Paragraph V) Captain Hubbard of the Lighthouse Division interpreted the present opinion as fixing the northerly line at a point "due west" of the Rock Island passage. (Abstract of Testimony p. 29)

Wisconsin's main contention regarding equal division of the water area, arises from its claim that a portion of Green Bay lying north and west of the Rock Island passage is here involved. Mr. F. P. Steinmetz, a witness for Wisconsin, who had proposed the line A B C D E F G H J, testified on cross-examination that the line proposed by Michigan, viz: K L M H, "was not equal, and the basis of that testimony is that I am considering water north of the line M H should be included as part of the disputed area."

> "SPECIAL MASTER: In other words, you are taking into consideration all of Green Bay, the entire portion of Green Bay that lies north of the line drawn out of the mouth of the Menominee River?
>
> WITNESS: Yes." (Abstract of Testimony p. 39)

WATER AREA NORTH OF ROCK ISLAND PASSAGE DETERMINED AS MICHIGAN AREA—THEREFORE NO LONGER IN ISSUE.

We repeat that the water area north of a line running due west of the Rock Island passage was previously in issue before this court, and was determined adversely to Wisconsin's claim. The present reference to the Master was for the purpose of settling a decree in harmony with that opinion.

On the first reference to the Master, Wisconsin was contending for a line at "a point half-way from the water's edge adjacent to Boyer's Bluff to the water's edge on the Michigan mainland at the mouth of Bark River; thence in a direct line to a point half-way from the water's edge at Boyer's Bluff to Driscoll Shoal; thence in a direct line to the light on St. Martin's Shoal; ***" (79 Law. Ed. 1543)

Regarding the claim then asserted by Wisconsin, the Master in his first report found:

> "The portion of Green Bay involved is only that portion lying north of the mouth of the Menominee river, west of Chambers Island and south of a line drawn due west from the center of the Rock Island passage to the Michigan mainland. Roughly speaking, the boundary would follow the line A. B. C. on the map, and thence in a generally northward course in the center of that portion of the bay until it would intersect a line extended from the point Q on the map to the Michigan mainland, and thence eastward through the center of the Rock Island passage to the center of Lake Michigan. *Wisconsin has no claim to any of the portion of Green Bay lying north of the last mentioned line* (Italics ours). Its rights are solely in the portion of Green Bay north of the mouth of the Menominee river, west of Chambers Island, and south of an extended line passing through the center of the Rock Island passage." (Report of Special Master—October Term, 1934, p. 37)

With that issue before it, this court by its opinion established A B as the southern line of the boundary, and fixed the northern line at "a point west of the Rock Island passage," and ordered the adoption of a decree in accordance therewith.

We disagree with the argument advanced by Wisconsin that consideration should be given to the water area of Green Bay north of the Rock Island passage. We have before us the problem of dividing a portion only, of the waters of Green Bay. No consideration is given to any water area south of the line A B extended. Equality demands that the area be limited on the north on the same basis.

The shores of Green Bay are substantially parallel, and it is only in the portion thereof south of the Rock Island passage and north of the Menominee River that the water area can be said to contain the boundary between these states.

AREA INVOLVED IS ENTIRE WATER AREA IN PORTION OF BAY INCLUDING COVES AND INDENTATIONS.

Plaintiff contends that in determining the water area to be equally divided a line should be drawn from headland to headland on Door Peninsula, Wisconsin, and the water area enclosed between such lines and the nearby shores disregarded under the doctrine of Fauces Terrae (jaws of the land). That is, the water of *Green Bay* lying east of the lines drawn from headland to headland would not be considered as water area to be divided.

Such interpretation largely benefits Wisconsin, since its shore line in the area involved is irregular, whereas the Michigan shore line is nearly straight. The rule of Fauces Terrae was urged by Wisconsin in connection with the previous report of the Master, and the present opinion of this court was rendered in the light of that contention. (Brief of Plaintiff, October Term, 1934, p. 118) It is clear from the opinion that this court intended to divide the *entire water area* between the shores of the

respective states in that portion of the bay herein involved. In computing the water area involved for the purposes of division, Michigan's witnesses followed the shore line, except Washington Harbor on Washington Island, which they crossed directly from point to point, because that bay is longer than it is narrow. (Abstract of Testimony p. 20) The Master makes no reference to this claim in his report, and we believe that issue is now foreclosed by the present opinion of this court which provides for "a division of the area as nearly equal as conveniently may be made, ***."

BOUNDARY LINE FROM POINT "H" TO CENTER OF LAKE MICHIGAN.

The Master recommends line H S, which is drawn scientifically along a perpendicular to the axis of Lake Michigan, and passes to the middle of the lake. He stated that, in his opinion, the Wisconsin Territorial Act called for a right angle turn in the center of Lake Michigan. Wisconsin would now adopt the same line. (Report p. 31)

Dr. Smith, State Geologist for Michigan, testified that the line into Lake Michigan should be "at right angles to the trend of the shore, the shortest line to the center of Lake Michigan." (Abstract of Testimony p. 24)

Captain Hubbard, Superintendent of Lighthouses, was of the same opinion. He said:

> "My idea of the proper course to pursue after leaving St. Martin's Light, in connection with the language of the Wisconsin Enabling Act, which defines the boundaries of the territory of Wisconsin as coming from the southerly along the middle of Lake Michigan to a point opposite the Rock Island Channel, would be to take and draw a line at right angles

and fetch up into the Rock Island passage. I should think that the most practical way to do would be to take and draw a line at right angles from this line over to the Rock Island Passage." (Abstract of Testimony pp. 27, 28)

BOUNDARY LINE A C CONDITIONALLY URGED BY WISCONSIN, CONFLICTS WITH PRESENT OPINION OF THIS COURT.

As will appear from the present opinion of this court, Wisconsin claimed that the original decree of this court entered in 1926 deprived "her of about thirty-five miles of fishing area opposite the city of Menominee, which, as she says, has always been under her jurisdiction." (79 Law. Ed. p. 1543) Wisconsin sought to have the line run from the center of the outer end of the piers of the harbor entrance of the Menominee River in a direct line to a point half-way from Chambers Island to the Michigan mainland.

The issue joined as shown by the first report of the Master respecting the triangular area of water within points A, B and C was squarely before this court, and has been determined adversely to Wisconsin's claim. Because of Wisconsin's present efforts to "evade" that determination we beg leave to refer to the former record and quote herein the applicable portions:

(Report of Special Master—October 1934 Term—pp. 20, 21, 23, 27, 28):

"Complainant alleges that by said erroneous decree it loses about thirty-five square miles of fishing area which has always been under the jurisdiction of Wisconsin and over which Michigan has never exercised any jurisdiction. Complainant prays that

the alleged erroneous portion of the decree may be stricken; that a true description as claimed by complainant be inserted; and for general equitable relief." (p. 20)

"Defendant alleges that it has had actual jurisdiction over the triangle of water in dispute for many years, and denies that said area was ever under the jurisdiction of Wisconsin." (p. 21)

"It will be observed that there is a triangle ••• which is the important water area involved in this law suit." (p. 23)

"I find that both Wisconsin and Michigan fishermen plied their occupations in the triangular disputed area, and, quite generally, in the waters of Green Bay." (p. 27)

"••• neither state has exercised such exclusive dominion over the waters now in dispute, and particularly over the triangular area in question, as to establish any certain or definite line as a boundary by possession and acquiescence." (p. 28)

Wisconsin was urging that the line run from the harbor entrance of the Menominee River to a point half-way between the west side of Chambers Island and the Michigan mainland. (See point B on map attached to Report of Special Master—October Term, 1934, described on p. 23 thereof.)

Michigan was claiming the line now proposed by the Master, namely A, B, C. (See Red line on map attached to Report of Special Master—October Term, 1934, described on p. 23 thereof.)

With that issue before it this court determined that the boundary line to be incorporated in the decree should run from point A to B to C, which alone would grant equality of water area to Michigan.

WISCONSIN'S PRESENT CLAIM FOR LINE A C INCONSISTENT WITH DECREES NOW PROPOSED BY IT TO THE MASTER.

At the recent hearing before the Master on the settlement of the decree, he requested both states to propose a line that would give effect to the present opinion of this court. Pursuant thereto Wisconsin filed with the Master "Wisconsin's Proposed Decree," (Report p. 20) and "Wisconsin's Alternative Proposed Decree." (Report p. 23) Each of these proposed decrees contended for the line A B C, which is now adopted by the Master. Wisconsin's written objections to the findings and proposed decree contain no objection to the line A B C. (Report p. 25) Without specifically objecting to the line A B C, Wisconsin now makes the conditional proposal that the line should run from A to C in the event the northerly line R H, which it objects to, should be adopted by this court.

We submit that line A C, which it conditionally proposes, has already been disapproved by this court, adversely to Wisconsin's claim, and that it is no longer an issue before this court.

NORTHERLY TERMINUS "a'" OF WISCONSIN'S PROPSED BOUNDARY GREATLY EXCEEDS FORMER CLAIM IN THIS SUIT.

Reference to the present opinion of this court will disclose that Wisconsin then (1934) urged that the line in the northern portion of the bay would be at a point "half-way from the water's edge at Boyer's Bluff to Driscoll Shoal." The present northerly point for which

it contends is point a', which is approximately due west of Driscoll Shoal. Point "a'" is approximately 4½ miles north of the point which Wisconsin in this present proceeding urged that this Honorable court adopt. That former claim of Wisconsin was disallowed by this court in its present opinion, the court directing that the decree herein should fix the northerly terminus of the boundary line at "a point west of the Rock Island Passage." Wisconsin's present claim would obtain for it greater water area than was heretofore claimed before this court, which first claim was disapproved by this court.

CONCLUSION

In conclusion we urge the adoption of the decree now proposed by the Master as embodying in technical language the boundary line as determined by this Honorable court and embodied in its present opinion.

The measurements and technical descriptions through Green Bay were obtained by counsel for both states from the United States Lake Survey Office, Detroit, Michigan.

The technical survey of the line in the Menominee River Section is the result of a joint survey made by the City Engineer of Menominee, Michigan, and the City Engineer of Marinette, Wisconsin.

The line as proposed by the Master gives effect to the opinion of this court by dividing equally that portion of the water area in Green Bay that is here involved. It is practical in that any fisherman can determine at all times whether he is operating in Michigan or Wisconsin and likewise enforcement officers may patrol the bay and enforce the laws of the respective states.

The line is fixed by taking advantage of permanent monuments built and maintained by the Lighthouse Bureau as an aid to mariner.

Respectfully submitted,

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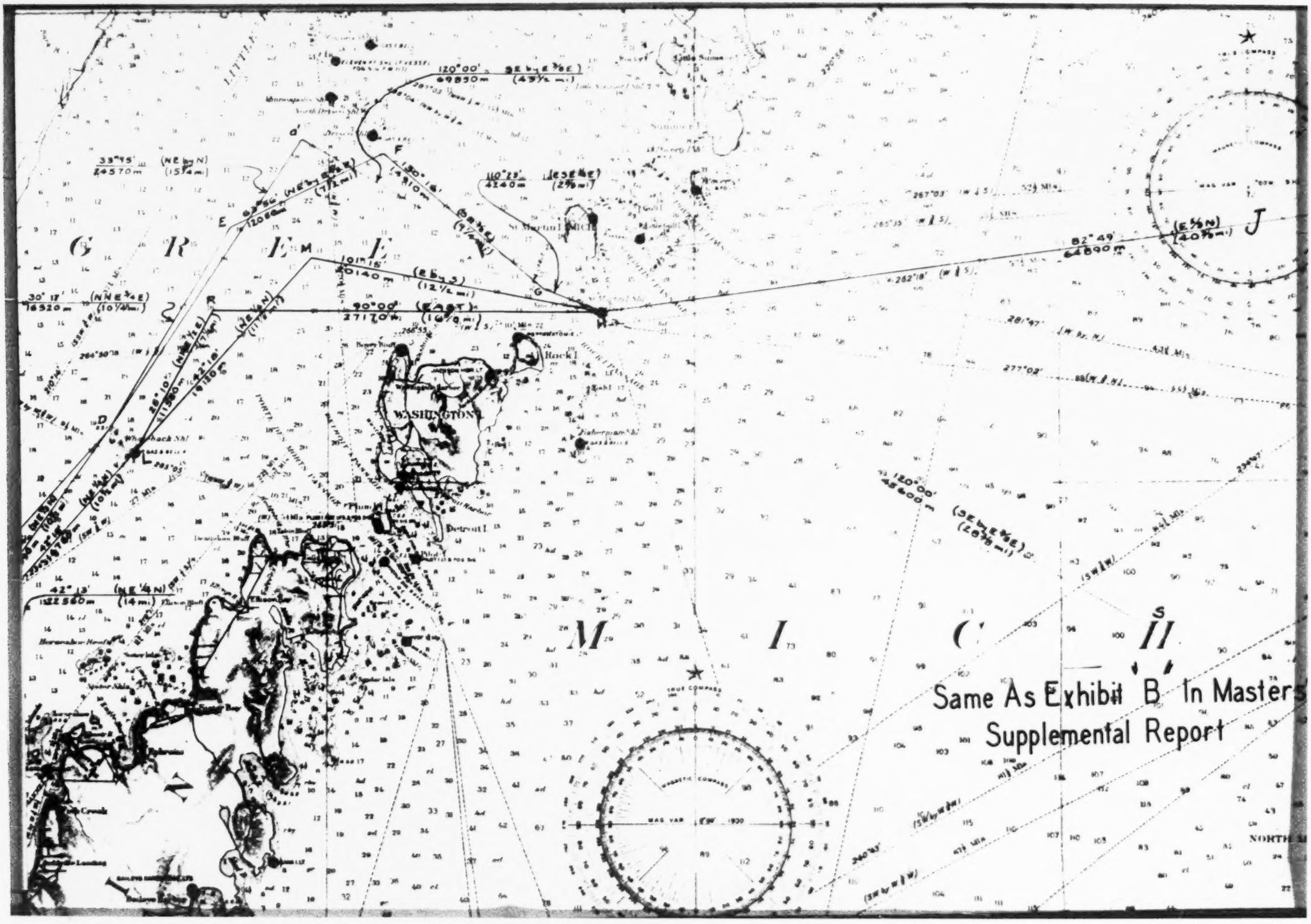
Attorney General of Michigan,

JAMES F. SHEPHERD,
Deputy Attorney General of Michigan,

EDWARD A. BILITZKE,
Assistant Attorney General of Michigan,
For Michigan.

Dated:
February 12, 1936.

NOTES
...rred to Standard Low Water Datum. See table of
s of water levels hereon.
...ctions are based on the North American Datum.
...ions on compass roses apply to their respective
...s and are expressed to the nearest quarter degree.
...tion as located at time of survey.
...epths to 21 feet are tinted in blue. Depths within
...et. Those on untinted areas are in fathoms.
...ndicate elevations in feet above mean lake level.
PENINSULA
GRAND
BAY
54° 20' (NE ⅞ E)
8140 m (5 mi.)
58° 30' (NE by E ½ E)
8290 m (5½ mi.)
30° 17' (NNE ¾ E)
16520 m (10¼ mi.)
38° 45' (NE by N)
24570 m (15¼ mi.)
42° 13' (NE ¼ N)
22560 m (14 mi.)
Cedar River
Ingalls Inn
Little Harbor
Escanaba
Gladstone
Rock Ndl.
Fourteen Foot Shoal
Spectacle Reef
Stonington Peninsula
Big Bay de Noc
Little Bay de Noc
Whitefish Point
Grand Island
Munising
Au Train
Marquette
Delta Co.
Schoolcraft Co.
Alger Co.
Marquette Co.
Luce Co.
Mackinac Co.
Chippewa Co.
Lake Michigan
Lake Superior
Lake Huron
Lake Michigan
A
B
C
D
E
K
L
R
Y


Same As Exhibit 'B' In Masters
Supplemental Report